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THE GENERAL STATUTES OF NORTH CAROLINA

OCT 9 1978

1978 INTERIM SUPPLEMENT

Prepared, under the Supervision of the Department of
Justice by the Editorial Staff of the Publishers

UNDER THE DIRECTION OF
W. M. WILLSON, J. H. VAUGHAN AND SYLVIA FAULKNER

To Be Used With the 1977 Cumulative Supplement

THE MICHIE COMPANY

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Preface

This 1978 Interim Supplement to the General Statutes of North Carolina contains the general and permanent laws enacted at the Second 1977 Session of the General Assembly, which was held in 1978, annotations from cases decided since the preparation of the 1977 Cumulative Supplement and available in advance sheets on June 12, 1978, and references to opinions of the Attorney General. In addition, this Supplement contains: certain sections and parts of sections added or amended by 1977 acts with postponed effective dates, which were set out only in notes in the 1977 Cumulative Supplement; recent amendments to the rules in the Appendices in Volume 4A; and certain sections and parts of sections set out to correct errors in the 1977 Cumulative Supplement or the replacement volumes.

Scope of Volume

1978 Interim Supplement**Statutes:**

Permanent portions of the general laws enacted at the 1977 Second Session of the General Assembly affecting Chapters 1 through 168 of the General Statutes.

Annotations:

Sources of the annotations:

North Carolina Reports through Volume 194, p. 445.

North Carolina Court of Appeals Reports through Volume 35.

Federal Reporter 2nd Series through Volume 575 (p. 300).

Federal Supplement through Volume 449.

Federal Rules Decisions through Volume 77 (p. 753).

United States Reports through Volume 434 (p. 235).

Supreme Court Reporter through Volume 98 (p. 1892).

The General Statutes of North Carolina

1978 Interim Supplement

Chapter 1.

Civil Procedure.

SUBCHAPTER II. LIMITATIONS.

ARTICLE 3.

Limitations, General Provisions.

§ 1-15. Statute runs from accrual of action.

Editor's Note. —

For article, "Statutes of Limitations in the Conflict of Laws," see 52 N.C.L. Rev. 489 (1974). For comment, "Medical Malpractice in North Carolina," see 54 N.C.L. Rev. 1214 (1976).

For survey of 1976 case law on torts, see 55 N.C.L. Rev. 1088 (1977).

For a note on the interaction between North Carolina's wrongful death statute and its statute of limitations for not readily apparent personal injuries or product defects, see 13 Wake Forest L. Rev. 543 (1977).

Applicability of Subsection (b). —

Subsection (b) of this section with its 10-year limitation does not apply in cases where the injured party, a stranger to the sale of the

defective goods, suffered no latent injury due to the existence of a defect in the goods at the time of sale. *Ward v. Hotpoint Div., Gen. Elec. Co.*, 35 N.C. App. 495, 241 S.E.2d 710 (1978).

Subsection (b) may apply to actions for breach of contract. *North Carolina State Ports Auth. v. Lloyd A. Fry Roofing Co.*, 294 N.C. 73, 240 S.E.2d 345 (1978).

Injury Must Be Readily Apparent. — Subsection (b) of this section applies only where the plaintiff's initial injury is "not readily apparent." *Ward v. Hotpoint Div., Gen. Elec. Co.*, 35 N.C. App. 495, 241 S.E.2d 710 (1978).

Applied in *Simpson v. Hurst Performance, Inc.*, 437 F. Supp. 445 (M.D.N.C. 1977).

§ 1-17. Disabilities.

Applied in *Simpson v. Hurst Performance, Inc.*, 437 F. Supp. 445 (M.D.N.C. 1977).

§ 1-21. Defendant out of State; when action begun or judgment enforced.

Editor's Note. —

For article, "Statutes of Limitations in the Conflict of Laws," see 52 N.C.L. Rev. 489 (1974).

For survey of 1976 case law on civil procedure, see 55 N.C.L. Rev. 914 (1977).

§ 1-26. New promise must be in writing.

Stated in *Whitley's Elec. Serv., Inc. v. Sherrod*, 293 N.C. 498, 238 S.E.2d 607 (1977).

§ 1-30. Applicable to actions by State.

When Statute, etc. —

In accord with first paragraph in original. *State v. West*, 293 N.C. 18, 235 S.E.2d 150 (1977).

The three-year statute of limitations pleaded

by the defendant was not applicable in an action by the State to recover from the defendant indictments issued in 1967 and 1968 since nothing in the record indicated when the

documents were taken from the possession of the State and therefore nothing indicated when the cause of action arose, and since the statute pleaded was not made expressly applicable to the State. *State v. West*, 293 N.C. 18, 235 S.E.2d 150 (1977).

Applicability to State Decided by Legislature. — Whether there ought to be a statute of limitations applicable to suits by the State is a matter for the legislature, not the courts. *State v. West*, 293 N.C. 18, 235 S.E.2d 150 (1977).

§ 1-31. Action upon a mutual, open and current account.

Mutual Account. —

An account may be "mutual" if there are reciprocal dealings so that each party extends credit to the other and the account is allowed to run with a view to an ultimate adjustment of the balance. *Whitley's Elec. Serv., Inc. v. Sherrod*, 293 N.C. 498, 238 S.E.2d 607 (1977).

Open Account. —

An ordinary open account results where the parties intend that the individual transactions are to be considered as a connected series rather than as independent of each other, a balance is kept by adjustment of debits and credits, and further dealings between the parties are contemplated. *Whitley's Elec. Serv., Inc. v. Sherrod*, 293 N.C. 498, 238 S.E.2d 607 (1977).

Current Account. —

An account is "running" or "current" where it continues with no time limitations fixed by express or implied agreement. *Whitley's Elec. Serv., Inc. v. Sherrod*, 293 N.C. 498, 238 S.E.2d 607 (1977).

Effect of Part Payment. — While there is language in some of the decisions suggesting that a part payment on a current account revives only those items that accrued within three years preceding the payment, the Supreme Court has not so held in any case where (1) a current account was established, (2) the debtor made a partial payment, and (3) there were circumstances showing that in making the

payment the debtor intended to acknowledge the entire account and thereby impliedly promised to pay the balance due. *Whitley's Elec. Serv., Inc. v. Sherrod*, 293 N.C. 498, 238 S.E.2d 607 (1977).

A part payment operates to toll the statute if made under such circumstances as will warrant the clear inference that the debtor in making the payment recognized his debt as then existing and acknowledged his willingness, or at least his obligation, to pay the balance. *Whitley's Elec. Serv., Inc. v. Sherrod*, 293 N.C. 498, 238 S.E.2d 607 (1977).

Where Debtor Acknowledges His Obligation. — Where suit is brought more than three years after the claim arises on an account or other contractual debt, the bar of the statute of limitations may be avoided if the debtor has acknowledged his obligation within three years prior to the date the action is filed. *Whitley's Elec. Serv., Inc. v. Sherrod*, 293 N.C. 498, 238 S.E.2d 607 (1977).

Where plaintiff sues on a current account, a part payment which constitutes an acknowledgment begins the statute running anew as to the entire amount that is acknowledged and not merely those items which accrued within three years of the payment. *Whitley's Elec. Serv., Inc. v. Sherrod*, 293 N.C. 498, 238 S.E.2d 607 (1977).

ARTICLE 5.

Limitation, Other than Real Property.

§ 1-47. Ten years.

I. IN GENERAL.

Editor's Note. —

For article, "Recognition of Foreign Judgments," see 50 N.C.L. Rev. 21 (1971).

For survey of 1976 case law on civil procedure, see 55 N.C.L. Rev. 914 (1977).

Quoted in *Walker Mfg. Co. v. Dickerson, Inc.*, 560 F.2d 1184 (4th Cir. 1977).

Cited in *North Carolina State Ports Auth. v. Lloyd A. Fry Roofing Co.*, 294 N.C. 73, 240 S.E.2d 345 (1978).

II. SUBDIVISION (1)—JUDGMENTS AND DECREES.

Periodic sums of alimony and child support which became due more than 10 years before the institution of a motion in a cause for a judicial determination of the amount due are barred by the 10-year limitation of this section. *Lindsey v. Lindsey*, 34 N.C. App. 201, 237 S.E.2d 561 (1977).

§ 1-50. Six years.

I. IN GENERAL.

Subdivision (5) Not Applicable to Simple Breach of Contract. — Subdivision (5) does not apply to an action, for a simple breach, by

defective performance, of a contract to construct an improvement on real property. *North Carolina State Ports Auth. v. Lloyd A. Fry Roofing Co.*, 294 N.C. 73, 240 S.E.2d 345 (1978).

§ 1-52. Three years.

I. IN GENERAL.

Effect of Part Payment. — A part payment operates to toll the statute if made under such circumstances as will warrant the clear inference that the debtor in making the payment recognized his debt as then existing and acknowledged his willingness, or at least his obligation, to pay the balance. *Whitley's Elec. Serv., Inc. v. Sherrod*, 293 N.C. 498, 238 S.E.2d 607 (1977).

While there is language in some of the decisions suggesting that a part payment on a current account revives only those items that accrued within three years preceding the payment, the Supreme Court has not so held in any case where (1) a current account was established, (2) the debtor made a partial payment, and (3) there were circumstances showing that in making the payment the debtor intended to acknowledge the entire account and thereby impliedly promised to pay the balance due. *Whitley's Elec. Serv., Inc. v. Sherrod*, 293 N.C. 498, 238 S.E.2d 607 (1977).

Where plaintiff sues on a current account, a part payment which constitutes an acknowledgment begins the statute running anew as to the entire amount that is acknowledged and not merely those items which accrued within three years of the payment. *Whitley's Elec. Serv., Inc. v. Sherrod*, 293 N.C. 498, 238 S.E.2d 607 (1977).

§ 1-53. Two years.

I. SUBDIVISION (1) — POLITICAL SUBDIVISIONS OF STATE.

Editor's Note. —

For article, "Statutes of Limitations in the Conflict of Laws," see 52 N.C.L. Rev. 489 (1974).

§ 1-54. One year.

Accrual of Action for Treble Damages, etc. —

An action for treble damages under § 75-16 is an action for a penalty subject to the one-year limitation of this section. *CF Indus., Inc. v. Transcontinental Gas Pipe Line Corp.*, 448 F. Supp. 475 (W.D.N.C. 1978).

Applied in *Ward v. Hotpoint Div., Gen. Elec. Co.*, 35 N.C. App. 495, 241 S.E.2d 710 (1978).

Quoted in *Walker Mfg. Co. v. Dickerson, Inc.*, 560 F.2d 1184 (4th Cir. 1977).

Cited in *North Carolina State Ports Auth. v. Lloyd A. Fry Roofing Co.*, 294 N.C. 73, 240 S.E.2d 345 (1978).

II. SUBDIVISION (1) — CONTRACTS.

Where guarantors were liable under a continuing guaranty which could only be revoked in writing, the time for bringing the action was not limited by the three-year statute of limitations. *Cities Serv. Oil Co. v. Howell Oil Co.*, 34 N.C. App. 295, 237 S.E.2d 921 (1977).

III. SUBDIVISION (2) — LIABILITY CREATED BY STATUTE.

Claims Under 42 U.S.C. § 1983. —

While the time limitation is borrowed from State law in an action under 42 U.S.C. § 1983, the federal rule fixes the time of accrual of the right of action. *Bireline v. Seagondollar*, 567 F.2d 260 (4th Cir. 1977).

It is proper to apply the limitation fixed for actions based upon "a liability created by statute" to actions brought under 42 U.S.C. § 1983 within this State. *Bireline v. Seagondollar*, 567 F.2d 260 (4th Cir. 1977).

The North Carolina statute of limitations in an action for treble damages under the North Carolina antitrust laws is one year. *Thomas v. Petro-Wash, Inc.*, 429 F. Supp. 808 (M.D.N.C. 1977).

ARTICLE 5A.

Limitations, Actions Not Otherwise Limited.

§ 1-56. All other actions, ten years.

Cited in *Bireline v. Seagondollar*, 567 F.2d 260 (4th Cir. 1977); *Wing v. Wachovia Bank & Trust Co.*, 35 N.C. App. 346, S.E.2d (1978).

SUBCHAPTER III. PARTIES.

ARTICLE 6.

Parties.

§ 1-57. Real party in interest; grantees and assignees.

I. REAL PARTIES IN INTEREST.

A. In General.

Absence of necessary parties does not merit nonsuit. Instead, the court should order a continuance so as to provide a reasonable time for them to be brought in and plead. *Booker v. Everhart*, 294 N.C. 146, 240 S.E.2d 360 (1978).

Proceedings Should Cease Until Necessary Parties Present. — Where a fatal defect of the parties is disclosed, the court should refuse to deal with the merits of the case until the absent parties are brought into the action. *Booker v. Everhart*, 294 N.C. 146, 240 S.E.2d 360 (1978).

Court Should Correct Defect in Parties By Own Motion. — In the absence of a proper motion by a competent person, a defect of the parties should be corrected by ex mero motu ruling of the court. *Booker v. Everhart*, 294 N.C. 146, 240 S.E.2d 360 (1978).

Applied in *In re Estate of Etheridge*, 33 N.C. App. 585, 235 S.E.2d 924 (1977).

III. ASSIGNMENTS.

Assignee for purposes of collection is not a "real party in interest." *Booker v. Everhart*, 294 N.C. 146, 240 S.E.2d 360 (1978).

SUBCHAPTER IIIA. JURISDICTION.

ARTICLE 6A.

Jurisdiction.

§ 1-75.4. Personal jurisdiction, grounds for generally.

Editor's Note. —

For article, "Recognition of Foreign Judgments," see 50 N.C.L. Rev. 21 (1971).

For article, "Statutes of Limitations in the Conflict of Laws," see 52 N.C.L. Rev. 489 (1974).

For survey of 1973 case law with regard to in personam jurisdiction over out-of-state corporations, see 52 N.C.L. Rev. 850 (1974).

For survey of 1976 case law on civil procedure, see 55 N.C.L. Rev. 914 (1977).

Subsidiary's Contacts Attributed to Parent Corporation. — The business relationship between an English corporation and its Tennessee subsidiary under the facts of the case was sufficiently analogous to a manufacturer-distributor relationship to permit the subsidiary's contacts with this State to be attributed to the parent corporation. See *Fieldcrest Mills, Inc. v. Mohasco Corp.*, 442 F. Supp. 424 (M.D.N.C. 1977).

Determination as to Minimum Contacts. —

The criteria for analyzing whether minimum contacts are present include: the quantity of the contacts, the nature and quality of the contacts, the source and connection of the cause of action with those contacts, the interest of the forum state and convenience. *Fieldcrest Mills, Inc. v. Mohasco Corp.*, 442 F. Supp. 424 (M.D.N.C. 1977).

Where foreign corporation obviously uses, benefits, etc. —

In cases of contract disputes, the touchstone in ascertaining the strength of the connection between the cause of action and the defendant's contacts is whether the cause arises out of attempts by the defendant to benefit from the laws of the forum state by entering the market in the forum state. *Fieldcrest Mills, Inc. v. Mohasco Corp.*, 442 F. Supp. 424 (M.D.N.C. 1977).

Evidence Sufficient to Establish Minimum Contacts. — See *Fieldcrest Mills, Inc. v.*

Mohasco Corp., 442 F. Supp. 424 (M.D.N.C. 1977).

Where the plaintiff's various causes of action — breach of warranty, negligence, misrepresentation, and unfair and deceptive practices — arose out of the defendant's attempts to enter and exploit the textile machinery market in North Carolina, there was

a strong connection between the causes of action and the defendant's various contacts with this State. *Fieldcrest Mills, Inc. v. Mohasco Corp.*, 442 F. Supp. 424 (M.D.N.C. 1977).

Applied in *North Brook Farm Lines v. McBrayer*, 35 N.C. App. 34, 241 S.E.2d 74 (1978).

Cited in *Booker v. Everhart*, 294 N.C. 146, 240 S.E.2d 360 (1978).

§ 1-75.7. Personal jurisdiction — grounds for without service of summons.

Editor's Note. —

For survey of 1974 case law on general appearance waiver, see 53 N.C.L. Rev. 1026 (1975).

The term "general appearance" as used in this section should be held to refer generally to appearances made either before the filing of jurisdictional motions under § 1A-1, Rule 12(b) before pleading or, if no such motions are filed, the appearances made before the defense is raised in responsive pleadings. *Smith v. Pacific Intermountain Express Co.*, 34 N.C. App. 694, 239 S.E.2d 614 (1977).

Filing of answer, interrogatories, etc., does not necessarily constitute general appearance.

— Defendant did not make a "general

appearance" where it promptly exercised its right to assert the defense of lack of jurisdiction under § 1A-1, Rule 12(b) by motion filed in the cause and served on plaintiffs, and before hearing on the motion filed an answer, a compulsory counterclaim, and interrogatories to aid in the defense of the case in the event the courts should eventually rule there was jurisdiction. *Smith v. Pacific Intermountain Express Co.*, 34 N.C. App. 694, 239 S.E.2d 614 (1977).

Applied in *Wiles v. Welparnel Constr. Co.*, 34 N.C. App. 157, 237 S.E.2d 297 (1977).

§ 1-75.11. Judgment against nonappearing defendant, proof of jurisdiction.

Nonappearing Defendant Served by Certified Mail. — This section basically requires two things before a default judgment can be entered against a nonappearing defendant who was served by certified mail. First, there must be proof of service of summons in the manner required by § 1-75.10(4). Second, where a personal claim is made against the defendant,

the court shall require proof by affidavit or other evidence, to be made and filed, of the existence of any fact not shown by verified complaint which is needed to establish grounds for personal jurisdiction over the defendant. *North Brook Farm Lines v. McBrayer*, 35 N.C. App. 34, 241 S.E.2d 74 (1978).

§ 1-75.12. Stay of proceeding to permit trial in a foreign jurisdiction.

Cited in *Allen v. Wachovia Bank & Trust Co.*, 35 N.C. App. 267, 241 S.E.2d 123 (1978).

SUBCHAPTER IV. VENUE.

ARTICLE 7.

Venue.

§ 1-83. Change of venue.

I. IN GENERAL.

Cited in *Gardner v. Gardner*, 294 N.C. 172, 240 S.E.2d 399 (1978).

§ 1-84. Removal for fair trial.

Cross Reference. — As to removal of action under Chapter 50 for alimony or divorce, see § 50-3.

SUBCHAPTER V. COMMENCEMENT OF ACTIONS.

ARTICLE 8.

*Summons.***§ 1-105. Service upon nonresident drivers of motor vehicles and upon the personal representatives of deceased nonresident drivers of motor vehicles.**

Requirement in subdivision (3) that refused registered letter be sent by ordinary mail applies only to those letters which were in fact "refused," and does not apply to those which are

unclaimed or marked "moved, not forwardable." *Ridge v. Wright*, 35 N.C. App. 643, 242 S.E.2d 389 (1978).

ARTICLE 9.

*Prosecution Bonds.***§ 1-110. Suit as a pauper; counsel.**

Local Modification. — By virtue of Session Laws 1977, 2nd Sess., c. 1176, Durham should be stricken from the replacement volume.

SUBCHAPTER VII. PRETRIAL HEARINGS; TRIAL AND ITS INCIDENTS.

ARTICLE 19.

*Trial.***§ 1-174. Issues of fact before the clerk.**

Partition Proceedings. — Although a partition proceeding is usually within the jurisdiction of the clerk of the superior court, when "issues of fact" are joined before the clerk,

the cause must be transferred to the superior court for trial. *Burke v. Harrington*, 35 N.C. App. 558, 241 S.E.2d 715 (1978).

§ 1-180: Repealed by Session Laws 1977, c. 711, s. 33, effective July 1, 1978.

I. IN GENERAL.

Editor's Note. —

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

II. OPINION OF JUDGE.

A. General Consideration.

Motive of Judge Immaterial. —

In accord with 2nd paragraph in original. See *State v. May*, 292 N.C. 644, 235 S.E.2d 178 (1977).

C. Illustrative Cases.

1. Remarks Held Not Erroneous.

d. Miscellaneous Remarks.

Instruction That Injury Was Serious. — In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury, an instruction that the victim's skull fracture was a serious injury did not violate this section. *State v. Davis*, 33 N.C. App. 262, 234 S.E.2d 762 (1977).

§ 1-181. Requests for special instructions.

Editor's Note. — For article discussing North Carolina jury instruction practice, see 52 N.C.L. Rev. 719 (1974).

Court Need Not Use Exact Words, etc. —

A defendant is not entitled to have his requested instructions given verbatim, so long as they are given in substance. *State v. Agnew*, 294 N.C. 382, 241 S.E.2d 684 (1978).

Court May Refuse Erroneous or Irrelevant Instructions. — The court may totally refuse instructions based on an erroneous statement of the law, or which concern issues irrelevant to the case. *State v. Agnew*, 294 N.C. 382, 241 S.E.2d 684 (1978).

§ 1-186. Exceptions to decision of court.**Editor's Note. —**

For survey of 1976 case law on civil procedure, see 55 N.C.L. Rev. 914 (1977).

SUBCHAPTER VIII. JUDGMENT.**ARTICLE 23.***Judgment.***§ 1-209. Judgments authorized to be entered by clerk; sale of property; continuance pending sale; writs of assistance and possession.**

Disbursement by Clerk of Restitution Funds. — The clerk of superior court had no jurisdiction to enter an order directing disbursement of restitution funds which the

defendant in a criminal proceeding had paid into court as result of a plea bargain. *State v. McIntyre*, 33 N.C. App. 557, 235 S.E.2d 920 (1977).

ARTICLE 26.*Declaratory Judgments.***§ 1-253. Courts of record permitted to enter declaratory judgments of rights, status and other legal relations.****Editor's Note. —**

For a comment on taxpayers' actions, see 13 Wake Forest L. Rev. 397 (1977).

Only Questions of Law Determined. — Absent a waiver of jury trial, the trial court under this Article may only determine questions

of law. *Hall v. Hall*, 35 N.C. App. 664, 242 S.E.2d 170 (1978).

Cited in *Moore v. Smith*, 33 N.C. App. 275, 235 S.E.2d 102 (1977); *In re Grady*, 33 N.C. App. 477, 235 S.E.2d 425 (1977).

§ 1-256. Enumeration of declarations not exclusive.

Editor's Note. — For a comment on taxpayers' actions, see 13 Wake Forest L. Rev. 397 (1977).

§ 1-257. Discretion of court.

Editor's Note. — For a comment on taxpayers' actions, see 13 Wake Forest L. Rev. 397 (1977).

§ 1-261. Jury trial.

Only Questions of Law Determined. — Absent a waiver of jury trial, the trial court under this Article may only determine questions

of law. *Hall v. Hall*, 35 N.C. App. 664, 242 S.E.2d 170 (1978).

§ 1-267. Short title.

Cited in *Wing v. Wachovia Bank & Trust Co.*, 35 N.C. App. 346, 241 S.E.2d 397 (1978).

SUBCHAPTER IX. APPEAL.

ARTICLE 27.

Appeal.

§ 1-277. Appeal from superior or district court judge.

II. APPEAL IN GENERAL.

A. General Consideration.

Stated in *Smith v. Pacific Intermountain Express Co.*, 34 N.C. App. 694, 239 S.E.2d 614 (1977).

Cited in *Digsby v. Gregory*, 35 N.C. App. 59, 240 S.E.2d 491 (1978); *Hudspeth v. Bunzey*, 35 N.C. App. 231, 241 S.E.2d 119 (1978).

B. From What Decisions, Order, etc., Appeal Lies.

Interlocutory Orders. —

This section in effect provides that no appeal lies to an appellate court from an interlocutory order or ruling of the trial judge unless such ruling or order deprives the appellant of a substantial right which he would lose if the ruling or order is not reviewed before final judgment. *Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 240 S.E.2d 338 (1978).

An order is interlocutory if it does not determine the issues but directs some further proceeding preliminary to final decree. *Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 240 S.E.2d 338 (1978).

An appeal from an interlocutory order will not be considered premature if it adversely affects a substantial right of the appellants. *Freeland v. Greene*, 33 N.C. App. 537, 235 S.E.2d 852 (1977).

Appeal from Denial of Motion for Summary Judgment. —

An order setting aside without prejudice a summary judgment on the grounds of

procedural irregularity, is interlocutory not immediately appealable. *Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 240 S.E.2d 338 (1978).

III. APPEAL AS TO PARTICULAR SUBJECTS.

G. Appeals as to Miscellaneous Subjects.

Order Permitting Intervention. —

An order granting intervention may be reviewed upon appeal from the final judgment in the cause. *Wood v. City of Fayetteville*, 35 N.C. App. 738, 242 S.E.2d 640 (1978).

An order granting the right of intervention is not appealable, as any of the original parties may appeal from an adverse decision granting the intervenor relief on the merits. *Wood v. City of Fayetteville*, 35 N.C. App. 738, 242 S.E.2d 640 (1978).

Although the rule is not absolute, ordinarily no appeal will lie from an order permitting intervention of parties unless the order adversely affects a substantial right which the appellant may lose if not granted an appeal before final judgment. The rule applies with equal vigor without regard to whether the trial court grants a motion to intervene as a matter of right pursuant to § 1A-1, Rule 24(a) or as permissive intervention pursuant to § 1A-1, Rule 24(b). *Wood v. City of Fayetteville*, 35 N.C. App. 738, 242 S.E.2d 640 (1978).

§ 1-279. Manner and time for taking appeal in civil action or special proceeding.

Applied in *Arnold v. Varnum*, 34 N.C. App. 22, 237 S.E.2d 272 (1977).

§ 1-289. Undertaking to stay execution on money judgment.

Quoted in Usher v. Waters Ins. & Realty Co.,
438 F. Supp. 1215 (W.D.N.C. 1977).

§ 1-292. How judgment for real property stayed.

Quoted in Usher v. Waters Ins. & Realty Co.,
438 F. Supp. 1215 (W.D.N.C. 1977).

§ 1-294. Scope of stay; security limited for fiduciaries.

Editor's Note. — For note discussing
abandonment of appeal, see 56 N.C.L. Rev. 573
(1978).

Applied in In re Will of Worrell, 35 N.C. App.
278, 241 S.E.2d 343 (1978).

SUBCHAPTER X. EXECUTION.**ARTICLE 28.***Execution.***§ 1-306. Enforcement as of course.****Judgment Directing Payment of Alimony. —**

A decree for periodic payments of alimony and support, in the absence of a provision in the decree itself which constitutes it a specific lien upon the property of the obligor, is not enforceable by execution until the arrears are

reduced to judgment by a judicial determination of the amount then due. This is so because the decree for alimony and support may be modified as circumstances may justify. Lindsey v. Lindsey, 34 N.C. App. 201, 237 S.E.2d 561 (1977).

§ 1-307. Issued from and returned to court of rendition.**May Issue Only from Court, etc. —**

Under this section only the clerk of superior court in the county where a judgment is rendered may issue execution even though the

judgment is docketed in other counties. Hickory White Trucks, Inc. v. Greene, 34 N.C. App. 279, 237 S.E.2d 862 (1977).

ARTICLE 29B.*Execution Sales.***Part 2. Procedure for Sale.****§ 1-339.54. Notice to judgment debtor of sale of real property.**

Stated in Henderson County v. Osteen, 292
N.C. 692, 235 S.E.2d 166 (1977).

ARTICLE 30.*Betterments.***§ 1-340. Petition by claimant; execution suspended; issues found.****Editor's Note. —**

For survey of 1976 case law on property, see
55 N.C.L. Rev. 1069 (1977).

ARTICLE 31.

*Supplemental Proceedings.***§ 1-362. Debtor's property ordered sold.**

Defendant's military retirement pay, paid into court by a garnishee, was entitled to the 60-day exemption under this section. *Elmwood*

v. Elmwood, 34 N.C. App. 652, 241 S.E.2d 693 (1977).

SUBCHAPTER XI. HOMESTEAD AND EXEMPTIONS.

ARTICLE 32.

*Property Exempt from Execution.***§ 1-371. Sheriff to summon and swear appraisers.**

Stated in *Seeman Printery, Inc. v. Schinhan*, 34 N.C. App. 637, 239 S.E.2d 744 (1977).

§ 1-372. Duty of appraisers; proceedings on return.

Section 1-376 must be read in *pari materia* and construed consistently with this section. *Seeman Printery, Inc. v. Schinhan*, 34 N.C. App. 637, 239 S.E.2d 744 (1977).

Valuation of Land and Buildings — Must Not Exceed \$1,000. —

The constitutional and statutory enactments relating to the homestead exemption cannot be so construed as to permit exemption of an entire usable dwelling house, regardless of its value. *Seeman Printery, Inc. v. Schinhan*, 34 N.C. App. 637, 239 S.E.2d 744 (1977).

Debtor's Right to Select. —

Where the debtor requested that the allotment

of his homestead begin at a point at the front door of his dwelling, with the result that the entire area allotted was located in the hallway adjacent to the front door of the house, the fact that the allotment was useless to the debtor and impaired the value of the remaining property available for satisfaction of the creditor's judgment did not entitle the debtor to claim his exemption in the entire dwelling. *Seeman Printery, Inc. v. Schinhan*, 34 N.C. App. 637, 239 S.E.2d 744 (1977).

§ 1-376. When appraisers select homestead.

Section 1-372 must be read in *pari materia* and construed consistently with this section. *Seeman Printery, Inc. v. Schinhan*, 34 N.C. App. 637, 239 S.E.2d 744 (1977).

Valuation of Dwelling House. — The constitutional and statutory enactments relating to the homestead exemption cannot be so construed as to permit exemption of an entire usable dwelling house, regardless of its value. *Seeman Printery, Inc. v. Schinhan*, 34 N.C. App. 637, 239 S.E.2d 744 (1977).

Manner of Allotment. — Where the debtor

requested that the allotment of his homestead begin at a point at the front door of his dwelling, with the result that the entire area allotted was located in the hallway adjacent to the front door of the house, the fact that the allotment was useless to the debtor and impaired the value of the remaining property available for satisfaction of the creditor's judgment did not entitle the debtor to claim his exemption in the entire dwelling. *Seeman Printery, Inc. v. Schinhan*, 34 N.C. App. 637, 239 S.E.2d 744 (1977).

§ 1-381. Exceptions to valuation and allotment; procedure.

Cited in *Seeman Printery, Inc. v. Schinhan*, 34 N.C. App. 637, 239 S.E.2d 744 (1977).

§ 1-386. Allotted on petition of owner.

Quoted in Seeman Printery, Inc. v. Schinhan,
34 N.C. App. 637, 239 S.E.2d 744 (1977).

SUBCHAPTER XIII. PROVISIONAL REMEDIES.**ARTICLE 35.****Attachment.****Part 1. General Provisions.****§ 1-440.1. Nature of attachment.****Editor's Note. —**

For survey of 1976 case law on constitutional
law, see 55 N.C.L. Rev. 965 (1977).

§ 1-440.2. Actions in which attachment may be had.

Cited in Elmwood v. Elmwood, 34 N.C. App.
652, 241 S.E.2d 693 (1977).

Part 2. Procedure to Secure Attachment.**§ 1-440.10. Bond for attachment.**

Editor's Note. — For article, "Should Security Be Required As a Pre-Condition to Provisional Injunctive Relief?," see 52 N.C.L. Rev. 1091 (1974).

§ 1-440.11. Affidavit for attachment; amendment.

Cited in Coor Farm Supply Serv., Inc. v.
Thompson, 35 N.C. App. 406, 241 S.E.2d 364
(1978).

Part 3. Execution of Order of Attachment; Garnishment.**§ 1-440.28. Admission by garnishee; setoff; lien.**

Stated in Elmwood v. Elmwood, 34 N.C. App.
652, 241 S.E.2d 693 (1977).

ARTICLE 36.**Claim and Delivery.****§ 1-475. Plaintiff's undertaking.****Editor's Note. —**

For article, "Should Security Be Required As a Pre-Condition to Provisional Injunctive Relief?," see 52 N.C.L. Rev. 1091 (1974).

ARTICLE 37.

*Injunction.***§ 1-494. Before what judge returnable.**

Applied in *Herff Jones Co. v. Allegood*, 35 N.C. App. 475, 241 S.E.2d 700 (1978).

SUBCHAPTER XIV. ACTION IN PARTICULAR CASES.

ARTICLE 41.

*Quo Warranto.***§ 1-515. Action by Attorney General.**

Editor's Note. — For a comment on taxpayers' actions, see 13 Wake Forest L. Rev. 397 (1977).

ARTICLE 43.

*Nuisance and Other Wrongs.***§ 1-538.1. Damages for malicious or willful destruction of property by minors.**

Applied in *In re Berry*, 33 N.C. App. 356, 235 S.E.2d 278 (1977).

ARTICLE 43B.

*Defense of Charitable Immunity Abolished.***§ 1-539.9. Defense abolished as to actions arising after September 1, 1967.**

Editor's Note. — For a note on the liability of those charged as custodians of the convicted for personal injuries inflicted by inmates, parolees, and probationers, see 13 Wake Forest L. Rev. 668 (1977).

ARTICLE 43C.

*Actions Pertaining to Cities.***§ 1-539.15. Claims against cities arising in contract or tort.**

Editor's Note. — Judicial and Constitutional Limitations," see 14 Wake Forest L. Rev. 215 (1978).
For comment, "Notice of Claim Requirements:

ARTICLE 43D.

*Abolition of Parent-Child Immunity in Motor Vehicle Cases.***§ 1-539.21. Abolition of parent-child immunity in motor vehicle cases.**

Quoted in *Triplett v. Triplett*, 34 N.C. App. 212, 237 S.E.2d 546 (1977).

SUBCHAPTER XV. INCIDENTAL PROCEDURE IN CIVIL ACTIONS.

ARTICLE 45A.

Arbitration and Award.

§ 1-567.6. Hearing.

Editor's Note. — For survey of 1976 case law on civil procedure, see 55 N.C.L. Rev. 914 (1977).

§ 1-567.12. Confirmation of an award.

Editor's Note. — For a note on the admission of an arbitrator's depositions and testimony to prove misconduct or fraud on the part of

arbitrators, see 13 Wake Forest L. Rev. 803 (1977).

§ 1-567.13. Vacating an award.

Editor's Note. — For a note on the admission of an arbitrator's depositions and testimony to prove misconduct or fraud on the part of

arbitrators, see 13 Wake Forest L. Rev. 803 (1977).

§ 1-567.14. Modification or correction of award.

Editor's Note. — For a note on the admission of an arbitrator's depositions and testimony to prove misconduct or fraud on the part of

arbitrators, see 13 Wake Forest L. Rev. 803 (1977).

Chapter 1A.**Rules of Civil Procedure.****§ 1A-1. Rules of Civil Procedure.****ARTICLE 1.***Scope of Rules — One Form of Action.***Rule 1. Scope of rules.**

Applied in *Gardner v. Gardner*, 294 N.C. 172, 240 S.E.2d 399 (1978).

Rule 2. One form of action.

Applied in *Swenson v. All Am. Assurance Co.*, 33 N.C. App. 458, 235 S.E.2d 793 (1977).

ARTICLE 2.*Commencement of Action; Service of Process, Pleadings, Motions, and Orders.***Rule 3. Commencement of action.**

Applied in *Swenson v. All Am. Assurance Co.*, 33 N.C. App. 458, 235 S.E.2d 793 (1977).

Rule 4. Process.**Editor's Note. —**

For survey of 1976 case law on civil procedure, see 55 N.C.L. Rev. 914 (1977).

Compliance Required for Valid Service. —

Where a statute provides for service of summons or notices in the progress of a cause by certain persons or by designated methods, the specified requirements must be complied with or there is no valid service. *Guthrie v. Ray*, 293 N.C. 67, 235 S.E.2d 146 (1977).

Return as Evidence of Service. —

When the return shows legal service by an authorized officer, nothing else appearing, the law presumes service. The service is deemed established unless, upon motion in the cause, the legal presumption is rebutted by evidence upon which a finding of nonservice is properly based. *Guthrie v. Ray*, 293 N.C. 67, 235 S.E.2d 146 (1977).

Summons Must Be Directed to Defendants. —

A summons was insufficient to give the court jurisdiction over the corporate defendant where it was directed to a named person as registered

agent, since one of the essential requirements of a summons as set out in section (b) of this rule is that it shall be directed to the defendant. *Wiles v. Welparnel Constr. Co.*, 34 N.C. App. 157, 237 S.E.2d 297 (1977).

When Subdivision (j)(9)b Applicable. — Subdivision (j)(9)b authorizes service of process by registered or certified mail on any party to an action commenced in a court of this State having jurisdiction of the subject matter and grounds for personal jurisdiction as provided in § 1-75.4, where the party to be served cannot after due diligence be served within, and is not an inhabitant of, this State. *North Brook Farm Lines v. McBrayer*, 35 N.C. App. 34, 241 S.E.2d 74 (1978).

Subdivision (j)(1)a must be strictly construed, etc. —

Where service of process is had by leaving the summons and complaint with a person other than the named defendant, the substitute person must be a "person of suitable age and discretion," who lives with defendant in his "dwelling house or usual place of abode," and

the summons must be left with the substitute person at their usual place of abode. If delivery is made elsewhere the service is invalid. *Guthrie v. Ray*, 293 N.C. 67, 235 S.E.2d 146 (1977).

Case under this blackletter line in the 1977 Cumulative Supplement reversed on other grounds in *Guthrie v. Ray*, 293 N.C. 67, 235 S.E.2d 146 (1977).

Subdivision (j)(6)b Contrasted with Federal Rule. — While subdivision (j)(6)b of this rule permits service on a corporation "by serving process upon ... [an agent authorized by appointment or by law] in a manner specified by any statute," the federal rule requires service on the corporation itself "in the manner prescribed by any statute." Thus, under North Carolina law any statute setting forth alternative means of serving such an agent may be considered, while under federal law consideration is limited to statutes providing means of serving corporations. *Great Dane Trailers, Inc. v. North Brook Poultry, Inc.*, 35 N.C. App. 752, 242 S.E.2d 533 (1978).

Return Showing Legal Service, etc. —

Case under this catchline in the 1977 Cumulative Supplement reversed on other grounds in *Guthrie v. Ray*, 293 N.C. 67, 235 S.E.2d 146 (1977).

Dwelling House or Usual Place of Abode. —

The better practice where service of notice is had by leaving the summons and complaint with a substitute person, would be for the sheriff to state explicitly in his return of service that the place where the summons was left was the dwelling house or usual place of abode of both the named defendant and "the person of suitable age and discretion" to whom he delivered the summons. *Guthrie v. Ray*, 293 N.C. 67, 235 S.E.2d 146 (1977).

But Return Receipt Together with, etc. —

A return receipt and the affidavit of plaintiffs' attorney averring that defendant did not have an authorized agent for service of process within this State, and that he had sent a copy of the summons and complaint to defendant by registered mail, return receipt requested, and that the process had been received by an authorized agent, showed sufficient compliance

with subdivision (j)(9)b of this rule to raise a rebuttable presumption of valid service. *Poole v. Hanover Brook, Inc.*, 34 N.C. App. 550, 239 S.E.2d 479 (1977).

Sheriff of County Need Not Initiate Service by Mail. — Nothing in subdivision (j)(9)b of this rule or elsewhere requires that service by registered or certified mail be initiated by the sheriff of the county in which process is issued. *Poole v. Hanover Brook, Inc.*, 34 N.C. App. 550, 239 S.E.2d 479 (1977).

Setting Aside Officer's Return. — An officer's return or a judgment based thereon may not be set aside unless the evidence consists of more than a single contradictory affidavit (the contradictory testimony of one witness) and is clear and unequivocal. *Guthrie v. Ray*, 293 N.C. 67, 235 S.E.2d 146 (1977).

The sheriff's return imports truth, and it cannot be overthrown or shown to be false by the affidavit, merely, of the person upon whom the service is alleged to have been made. *Guthrie v. Ray*, 293 N.C. 67, 235 S.E.2d 146 (1977).

The rule that a sheriff's return cannot be overthrown or shown to be false by the affidavit, merely, of the person upon whom the service is alleged to have been made, evolved to avoid the spectacle of such a confrontation between a party to an action and a public officer sworn to perform the duties of his office according to law. *Guthrie v. Ray*, 293 N.C. 67, 235 S.E.2d 146 (1977).

The rule that an officer's return of service may not be set aside upon the contradictory testimony of one witness does not place an undue burden on a person who in truth has not been legally served. *Guthrie v. Ray*, 293 N.C. 67, 235 S.E.2d 146 (1977).

Federal law generally is in accordance with the familiar rule that "the officer's return upon the summons imports verity" and the presumption "can be overcome only by strong and convincing evidence." *Guthrie v. Ray*, 293 N.C. 67, 235 S.E.2d 146 (1977).

Applied in *Swenson v. All Am. Assurance Co.*, 33 N.C. App. 458, 235 S.E.2d 793 (1977).

Rule 5. Service and filing of pleadings and other papers.

Applied in *North Brook Farm Lines v. McBrayer*, 35 N.C. App. 34, 241 S.E.2d 74 (1978).

Rule 6. Time.

Enlarging Time for Filing Answer. —

Section (b) of this rule gives the trial court the discretionary authority to enlarge the time

period for filing an answer. *Norris v. West*, 35 N.C. App. 21, 239 S.E.2d 715 (1978).

If the request for an enlargement of the time

period for filing an answer is made after the expiration of the time to file, the court may enlarge the time period for filing if the failure

to file was the result of excusable neglect. *Norris v. West*, 35 N.C. App. 21, 239 S.E.2d 715 (1978).

ARTICLE 3.

Pleadings and Motions.

Rule 7. Pleadings allowed; form of motions.

Applied in *North Brook Farm Lines v. McBrayer*, 35 N.C. App. 34, 241 S.E.2d 74 (1978).

Stated in *Gardner v. Gardner*, 294 N.C. 172, 240 S.E.2d 399 (1978).

Rule 8. General rules of pleadings.

Editor's Note. —

For a survey of decisions under the North Carolina Rules of Civil Procedure, see 50 N.C.L. Rev. 729 (1972).

Action on Contract Does Not Require Entire Writing. — The principle of pleading, well established under the former Code, that in an action on a written contract it is not mandatory to make the entire writing a part of the complaint, is not specifically set forth in the present Rules of Civil Procedure, Chapter 1A, but it is implicit in the present requirement of this rule that the plaintiff's claim for relief be set forth in "a short and plain statement of the claim" and that "each averment of a pleading shall be simple, concise, and direct." *RGK, Inc. v. United States Fid. & Guar. Co.*, 292 N.C. 668, 235 S.E.2d 234 (1977).

To hold that, in order to resist successfully a motion to dismiss, a materialman, who sues on a contractor's payment bond, must set forth in his complaint, by attachment or otherwise, the contract between the builder and the owner, including all plans and specifications for the construction of an apartment complex, would make a farce of the requirement of the present rules that the plaintiff state his claim in a "short and plain statement ... simple, concise, and

direct." *RGK, Inc. v. United States Fid. & Guar. Co.*, 292 N.C. 668, 235 S.E.2d 234 (1977).

Failure to Plead Defense Which Must Be Plead. — The exclusion of evidence on the ground that an affirmative defense was not specifically pleaded may be raised properly at trial. *Cooke v. Cooke*, 34 N.C. App. 124, 237 S.E.2d 323 (1977).

Defenses Raised in Hearing on Motion for Summary Judgment. — The nature of summary judgment procedure, coupled with the generally liberal rules relating to amendment of pleadings, requires that unpleaded affirmative defenses be deemed part of the pleadings where such defenses are raised in a hearing on motion for summary judgment. *Cooke v. Cooke*, 34 N.C. App. 124, 237 S.E.2d 323 (1977).

Applied in *Ross v. Ross*, 33 N.C. App. 447, 235 S.E.2d 405 (1977); *Streeter v. Streeter*, 33 N.C. App. 679, 236 S.E.2d 185 (1977); *North Carolina Nat'l Bank v. McCarley & Co.*, 34 N.C. App. 689, 239 S.E.2d 583 (1977).

Quoted in *Fagan v. Hazzard*, 34 N.C. App. 312, 237 S.E.2d 916 (1977).

Stated in *Hudspeth v. Bunzey*, 35 N.C. App. 231, 241 S.E.2d 119 (1978).

Cited in *Acker v. Barnes*, 33 N.C. App. 750, 236 S.E.2d 715 (1977).

Rule 12. Defenses and objections — when and how presented — by pleading or motion — motion for judgment on pleading.

Editor's Note. —

For a survey of decisions under the North Carolina Rules of Civil Procedure, see 50 N.C.L. Rev. 729 (1972).

Sufficiency of Complaint. —

In accord with 1st paragraph in 1977 Cum. Supp. See *North Carolina Nat'l Bank v. McCarley & Co.*, 34 N.C. App. 689, 239 S.E.2d 583 (1977).

In accord with 4th paragraph in 1977 Cum.

Supp. See *North Carolina Nat'l Bank v. McCarley & Co.*, 34 N.C. App. 689, 239 S.E.2d 583 (1977).

Claim should not be dismissed unless it appears, etc. —

In accord with 2nd paragraph in 1977 Cum. Supp. See *North Carolina Nat'l Bank v. McCarley & Co.*, 34 N.C. App. 689, 239 S.E.2d 583 (1977); *Kelly v. Briles*, 35 N.C. 714, 242 S.E.2d 883 (1978).

Complaint without Merit May Be Dismissed. —

In accord with 1st paragraph in 1977 Cum. Supp. See *North Carolina Nat'l Bank v. McCarley & Co.*, 34 N.C. App. 689, 239 S.E.2d 583 (1977).

Judgment on the pleadings under section (c), etc. —

A motion for judgment on the pleadings is not favored by the courts; pleadings alleged to state no cause of action or defense will be liberally construed in favor of the pleader. *RGK, Inc. v. United States Fid. & Guar. Co.*, 292 N.C. 668, 235 S.E.2d 234 (1977).

Insufficiency of Service Not Waived by Taking Plaintiff's Deposition. — Defendant did not waive the defense of insufficiency of service of process by taking plaintiff's deposition after answer was filed raising the jurisdictional defense. *Wiles v. Welparnel Constr. Co.*, 34 N.C. App. 157, 237 S.E.2d 297 (1977).

Motion for more definite statement is not favored by the courts and is sparingly granted because pleadings may be brief and lacking in factual detail, and because of the extensive discovery devices available to the movant. *Ross v. Ross*, 33 N.C. App. 447, 235 S.E.2d 405 (1977).

The motion for a more definite statement is the most purely dilatory of all the motions available under the Rules of Civil Procedure. *Ross v. Ross*, 33 N.C. App. 447, 235 S.E.2d 405 (1977).

When Motion for More Definite Statement Granted. — So long as the pleading meets the requirements of Rule 8 and fairly notifies the opposing party of the nature of the claim, a motion for more definite statement will not be granted. *Ross v. Ross*, 33 N.C. App. 447, 235 S.E.2d 405 (1977).

Judge's Discretion on Motion for More Definite Statement. — The granting or denial

of a motion for a more definite statement rests in the sound discretion of the trial judge, and his ruling thereon will not be overturned on appeal absent a showing of abuse of discretion. *Ross v. Ross*, 33 N.C. App. 447, 235 S.E.2d 405 (1977).

Motion under Section (f) Not Proper to Challenge Motion to Dismiss. — A motion to strike "any insufficient defense or any redundant, irrelevant, immaterial, impertinent or scandalous matter" under section (f) is not the proper motion by which to challenge a notice of dismissal without prejudice. *Travelers Ins. Co. v. Ryder Truck Rental, Inc.*, 34 N.C. App. 379, 238 S.E.2d 193 (1977).

Applied in *Acker v. Barnes*, 33 N.C. App. 750, 236 S.E.2d 715 (1977); *North Carolina Nat'l Bank v. McCarley & Co.*, 34 N.C. App. 689, 239 S.E.2d 583 (1977); *North Carolina State Ports Auth. v. Lloyd A. Fry Roofing Co.*, 294 N.C. 73, 240 S.E.2d 345 (1978).

Cited in *Guthrie v. Ray*, 293 N.C. 67, 235 S.E.2d 146 (1977); *Grabowski v. Dresser*, 33 N.C. App. 573, 235 S.E.2d 883 (1977); *Taylor v. Bailey*, 34 N.C. App. 290, 237 S.E.2d 918 (1977); *Smith v. Pacific Intermountain Express Co.*, 34 N.C. App. 694, 239 S.E.2d 614 (1977); *Vaughn v. Durham County Dep't of Social Servs.*, 34 N.C. App. 416, 240 S.E.2d 456 (1977); *Gardner v. Gardner*, 294 N.C. 172, 240 S.E.2d 399 (1978); *Grant v. Emmco Ins. Co.*, 35 N.C. App. 246, 241 S.E.2d 114 (1978); *Allen v. Wachovia Bank & Trust Co.*, 35 N.C. App. 267, 241 S.E.2d 123 (1978); *Louchheim, Eng. & People, Inc. v. Carson*, 35 N.C. App. 299, 241 S.E.2d 401 (1978); *Ralph Stachon & Assocs. v. Greenville Broadcasting Co.*, 35 N.C. App. 540, 241 S.E.2d 884 (1978); *Ridge v. Wright*, 35 N.C. App. 643, 242 S.E.2d 389 (1978).

Rule 13. Counterclaim and crossclaim.**Editor's Note. —**

For survey of 1976 case law on civil procedure, see 55 N.C.L. Rev. 914 (1977).

Failure to assert a compulsory counterclaim will ordinarily bar future action on the claim. *Hudspeth v. Bunzey*, 35 N.C. App. 231, 241 S.E.2d 119 (1978).

The purpose of section (a) of this rule making certain counterclaims compulsory, is to enable one court to resolve all related claims in one action, thereby avoiding a wasteful multiplicity of litigation. *Gardner v. Gardner*, 294 N.C. 172, 240 S.E.2d 399 (1978).

Section (a) of this rule is applied to marital disputes as follows: Any claim which is filed as an independent, separate action by one spouse during the pendency of a prior claim filed by the other spouse and which may be denominated a

compulsory counterclaim under section (a), may not be prosecuted during the pendency of the prior action but must be dismissed with leave to file it as a counterclaim in the prior action or stayed until final judgment has been entered in that action. The claim, however, will not be barred by reason of section (a) if it is filed after final judgment has been entered in the prior action. *Gardner v. Gardner*, 294 N.C. 172, 240 S.E.2d 399 (1978).

Divorce Actions Covered by Section (a). — The statutes dealing specifically with divorce actions do not prescribe a procedure for counterclaims different from that prescribed in section (a) of this rule. *Gardner v. Gardner*, 294 N.C. 172, 240 S.E.2d 399 (1978).

There is no conflict between the statutes dealing with procedure in divorce actions and

section (a) of this rule. Rather, section (a) superimposes an additional characteristic on certain kinds of counterclaims. *Gardner v. Gardner*, 294 N.C. 172, 240 S.E.2d 399 (1978).

Denial of motion to amend answer to allege compulsory counterclaim affects a substantial right and is immediately appealable. *Hudspeth v. Bunzey*, 35 N.C. App. 231, 241 S.E.2d 119 (1978).

Applicability of Section (a) When 2nd Independent Action Involved. — In order to

give effect to the purpose of section (a) of this rule once its applicability to a 2nd independent action has been determined, this 2nd action must on motion be either (1) dismissed with leave to file it in the former case or (2) stayed until the former case has been finally determined. *Gardner v. Gardner*, 294 N.C. 172, 240 S.E.2d 399 (1978).

Rule 15. Amended and supplemental pleadings.

Editor's Note. —

For survey of 1972 case law on trial of issues by implied consent under section (b) of this rule, see 51 N.C.L. Rev. 1003 (1973).

The judge has broad discretionary powers, etc. —

Conforming amendments under section (b) are within the sound discretion of the court and should not be allowed where they fail to support the action or defense upon the merits. *Murphy*

v. Murphy, 34 N.C. App. 677, 239 S.E.2d 597 (1977).

Denial of motion to amend answer to allege compulsory counterclaim affects a substantial right and is immediately appealable. *Hudspeth v. Bunzey*, 35 N.C. App. 231, 241 S.E.2d 119 (1978).

Rule 16. Pretrial procedure; formulating issues.

Cited in *Knight v. Duke Power Co.*, 34 N.C. App. 218, 237 S.E.2d 574 (1977).

ARTICLE 4.

Parties.

Rule 17. Parties plaintiff and defendant; capacity.

Editor's Note. —

For comment analyzing North Carolina guardianship laws, see 54 N.C.L. Rev. 389 (1976).

Absence of necessary parties does not merit a nonsuit. Instead, the court should order a continuance so as to provide a reasonable time for them to be brought in and pled. *Booker v. Everhart*, 294 N.C. 146, 240 S.E.2d 360 (1978).

Proceedings Should Cease Until Necessary Parties Present. — Where a fatal defect of the parties is disclosed, the court should refuse to deal with the merits of the case until the absent parties are brought into the action. *Booker v. Everhart*, 294 N.C. 146, 240 S.E.2d 360 (1978).

Court Should Correct Defect of Parties by Own Motion. — In the absence of a proper motion by a competent person, a defect of the parties should be corrected by ex mero motu ruling of the court. *Booker v. Everhart*, 294 N.C. 146, 240 S.E.2d 360 (1978).

An assignee for purposes of collection is not a "real party in interest." *Booker v. Everhart*, 294 N.C. 146, 240 S.E.2d 360 (1978).

Quoted in *Andrex Indus. Corp. v. Western Carolina Warehousing Co.*, 35 N.C. App. 122, 239 S.E.2d 850 (1978).

Rule 19. Necessary joinder of parties.

Proper parties may be joined. —

In accord with 1st paragraph in 1977 Cum. Supp. See *Booker v. Everhart*, 294 N.C. 146, 240 S.E.2d 360 (1978).

In accord with 2nd paragraph in 1977 Cum. Supp. See *Booker v. Everhart*, 294 N.C. 146, 240 S.E.2d 360 (1978).

Necessary parties must be joined, etc. —

In accord with 1977 Cum. Supp. See *Booker v. Everhart*, 294 N.C. 146, 240 S.E.2d 360 (1978).

Necessary Parties. —

In accord with 1st paragraph in original. See *Booker v. Everhart*, 294 N.C. 146, 240 S.E.2d 360 (1978).

In accord with 3rd paragraph in original. See *Booker v. Everhart*, 294 N.C. 146, 240 S.E.2d 360 (1978).

Absence of necessary parties does not merit a nonsuit. Instead, the court should order a continuance so as to provide a reasonable time for them to be brought in and pled. *Booker v. Everhart*, 294 N.C. 146, 240 S.E.2d 360 (1978).

Rule 23. Class actions.

Cited in *Big Bear of N.C., Inc. v. City of High Point*, 33 N.C. App. 563, 235 S.E.2d 911 (1977), rev'd, 294 N.C. 262, 240 S.E.2d 422 (1978); *Wood*

Proceedings Should Cease Until Necessary Parties Present. —

Where a fatal defect of the parties is disclosed, the court should refuse to deal with the merits of the case until the absent parties are brought into the action. *Booker v. Everhart*, 294 N.C. 146, 240 S.E.2d 360 (1978).

Court Should Correct Defect of Parties by Own Motion. —

In the absence of a proper motion by a competent person, a defect of the parties should be corrected by *ex mero motu* ruling of the court. *Booker v. Everhart*, 294 N.C. 146, 240 S.E.2d 360 (1978).

Applied in *Meachem v. Boyce*, 35 N.C. App. 506, 241 S.E.2d 880 (1978).

v. City of Fayetteville, 35 N.C. App. 738, 242 S.E.2d 640 (1978).

Rule 24. Intervention.**Appeal of Order Granting Intervention. —**

Although the rule is not absolute, ordinarily no appeal will lie from an order permitting intervention of parties unless the order adversely affects a substantial right which the appellant may lose if not granted an appeal before final judgment. The rule applies with equal vigor without regard to whether the trial court grants a motion to intervene as a matter of right pursuant to section (a) or as permissive intervention pursuant to section (b). *Wood v. City of Fayetteville*, 35 N.C. App. 738, 242 S.E.2d 640 (1978).

An order granting intervention may be reviewed upon appeal from the final judgment in the cause. *Wood v. City of Fayetteville*, 35 N.C. App. 738, 242 S.E.2d 640 (1978).

An order granting the right of intervention is not appealable, as any of the original parties may appeal from an adverse decision granting the intervenor relief on the merits. *Wood v. City of Fayetteville*, 35 N.C. App. 738, 242 S.E.2d 640 (1978).

Rule 25. Substitution of parties upon death, incompetency or transfer of interest; abatement.

Applied in *In re Estate of Etheridge*, 33 N.C. App. 585, 235 S.E.2d 924 (1977).

ARTICLE 5.***Depositions and Discovery.*****Rule 26. General provisions governing discovery.**

Cross Reference. — As to time for beginning and completing discovery, see Superior and District Court Rule 8, Appendix I, Volume 4A.

Editor's Note. —

For a note on the scope of discovery under the 1975 amendment to this rule, see 13 *Wake Forest L. Rev.* 640 (1977).

Orders regarding matters of discovery are within the discretion of the trial court and will not be upset on appeal absent a showing of abuse of discretion. *Hudson v. Hudson*, 34 N.C. App. 144, 237 S.E.2d 479, petition for review denied, 293 N.C. 589, 238 S.E.2d 784 (1977).

Rule 34. Production of documents and things and entry upon land for inspection and other purposes.

Editor's Note. —

For survey of 1976 case law on civil procedure, see 55 N.C.L. Rev. 914 (1977).

Cited in *Hudson v. Hudson*, 34 N.C. App. 144, 237 S.E.2d 479, petition for review denied, 293 N.C. 589, 238 S.E.2d 784 (1977).

Rule 35. Physical and mental examination of persons.

Editor's Note. —

For comment surveying North Carolina law of

relational privilege, see 50 N.C.L. Rev. 630 (1972).

Rule 37. Failure to make discovery; sanctions.

Cited in *House of Style Furn. Corp. v. Scronce*, 33 N.C. App. 365, 235 S.E.2d 258 (1977); *Waters*

v. Qualified Personnel, Inc., 294 N.C. 200, 240 S.E.2d 338 (1978).

ARTICLE 6.

Trials.

Rule 40. Assignment of cases for trial; continuances.

Editor's Note. —

For survey of 1976 case law on civil procedure, see 55 N.C.L. Rev. 914 (1977).

Rule 41. Dismissal of actions.

Editor's Note. —

For a survey of decisions under the North Carolina Rules of Civil Procedure, see 50 N.C.L. Rev. 729 (1972).

For survey of 1973 case law on involuntary dismissals under sections (b) and (c) of this rule, see 52 N.C.L. Rev. 822 (1974).

For survey of 1976 case law on civil procedure, see 55 N.C.L. Rev. 914 (1977).

Plaintiff May Not Dismiss If Defendant Has, etc. —

The trial court properly allowed voluntary dismissal without prejudice by the plaintiff where the defendant's cross-claim was an action for indemnification contingent upon the plaintiff's recovery and thus was in no way affirmative relief. *Travelers Ins. Co. v. Ryder Truck Rental, Inc.*, 34 N.C. App. 379, 238 S.E.2d 193 (1977).

Judge May Sustain Motion, etc. —

In accord with 1977 Cum. Supp. See *Neasham v. Day*, 34 N.C. App. 53, 237 S.E.2d 287 (1977).

But Is Not Compelled to Pass, etc. —

Under section (b), the trial judge may decline to render judgment until all the evidence is in.

The practice of withholding judgment until all the evidence has been presented is considered the better practice except in the clearest cases. *Neasham v. Day*, 34 N.C. App. 53, 237 S.E.2d 287 (1977).

Defendant's Motion Challenges Sufficiency, etc. —

In an action tried without a jury the appropriate motion by which defendants test the sufficiency of plaintiffs' evidence is by motion for dismissal. *Neasham v. Day*, 34 N.C. App. 53, 237 S.E.2d 287 (1977).

Question Raised by Section (b). —

The question raised by defendants' motion to dismiss made at the close of all the evidence is whether any findings of fact could be made from the evidence which would support a recovery for plaintiffs. If such findings can be made the motion to dismiss must be denied. *Neasham v. Day*, 34 N.C. App. 53, 237 S.E.2d 287 (1977).

Rule 12(b) Motion Not Proper to Challenge Motion to Dismiss. —

A motion to strike "any insufficient defense or any redundant, irrelevant, immaterial, impertinent or scandalous matter" under Rule 12(f) is not the

proper motion by which to challenge a notice of dismissal without prejudice. *Travelers Ins. Co. v. Ryder Truck Rental, Inc.*, 34 N.C. App. 379, 238 S.E.2d 193 (1977).

Cited in *House of Style Furn. Corp. v. Scronce*,

33 N.C. App. 365, 235 S.E.2d 258 (1977); *Gray v. American Express Co.*, 34 N.C. App. 714, 239 S.E.2d 621 (1977); *O'Grady v. First Union Nat'l Bank*, 35 N.C. App. 315, 241 S.E.2d 375 (1978).

Rule 43. Evidence.

Showing of Prejudicial Exclusion on Appeal. —

In accord with 1977 Cum. Supp. See *Love v. Pressley*, 34 N.C. App. 503, 239 S.E.2d 574 (1977).

Preservation of Answer When Inquiry Shown to Be Immaterial. — While section (c) of this rule specifically requires the judge to preserve the offer of evidence in the record in

a civil case, where the witness has already answered the question sufficiently to demonstrate the immateriality of the inquiry, the judge's refusal to allow the preservation of the answer will not be held prejudicial error. *State v. Chapman*, 294 N.C. 407, 241 S.E.2d 667 (1978).

Cited in *Moore v. Galloway*, 35 N.C. App. 394, 241 S.E.2d 386 (1978).

Rule 44. Proof of official record.

Cited in *Burke v. Harrington*, 35 N.C. App. 558, 241 S.E.2d 715 (1978).

Rule 46. Objections and exceptions.

Editor's Note. —

For article discussing North Carolina jury instruction practice, see 52 N.C.L. Rev. 719 (1974).

For survey of 1976 case law on evidence, see 55 N.C.L. Rev. 1033 (1977).

Cited in *In re Will of Ray*, 35 N.C. App. 646, 242 S.E.2d 194 (1978).

Rule 49. Verdicts.

Applied in *Streeter v. Streeter*, 33 N.C. App. 679, 236 S.E.2d 185 (1977).

Rule 50. Motion for a directed verdict and for judgment notwithstanding the verdict.

Editor's Note. —

For a survey of decisions under the North Carolina Rules of Civil Procedure, see 50 N.C.L. Rev. 729 (1972).

For comment on directing the verdict in favor of the party with the burden of proof, see 50 N.C.L. Rev. 843 (1972).

Federal Rule 50 Similar and Thus Its Interpretations Are Instructive. — Since the North Carolina and Federal Rules 50 are substantially similar, federal interpretations are instructive to supplement the North Carolina decisions. *Love v. Pressley*, 34 N.C. App. 503, 239 S.E.2d 574 (1977).

Question Presented by Motion, etc. —

In determining the sufficiency of evidence to withstand a defendant's motions for directed verdict and for judgment notwithstanding the verdict, all the evidence which supports the plaintiffs' claim must be taken as true and considered in the light most favorable to them, giving them the benefit of every reasonable inference which may legitimately be drawn therefrom, and resolving contradictions, conflicts and inconsistencies in their favor. *Love v. Pressley*, 34 N.C. App. 503, 239 S.E.2d 574 (1977).

Trial Judge Must Consider Evidence in Light, etc. —

In accord with 3rd paragraph in 1977 Cum. Supp. See Denning v. Lee, 35 N.C. App. 565, 241 S.E.2d 706 (1978).

In accord with 11th paragraph in 1977 Cum. Supp. See Snider v. Dickens, 293 N.C. 356, 237 S.E.2d 388 (1977).

In accord with 16th paragraph in 1977 Cum. Supp. See Mintz v. Foster, 35 N.C. App. 638, 242 S.E.2d 181 (1978).

Conflicts Resolved, etc. —

In accord with 2nd paragraph in 1977 Cum. Supp. See Snider v. Dickens, 293 N.C. 356, 237 S.E.2d 388 (1977).

Specific Grounds Must Be Stated, etc. —

In accord with 1st paragraph in 1977 Cum. Supp. See Love v. Pressley, 34 N.C. App. 503, 239 S.E.2d 574 (1977).

Motion for directed verdict must state specific grounds, and this provision is mandatory. Love v. Pressley, 34 N.C. App. 503, 239 S.E.2d 574 (1977).

Rule 51. Instructions to jury.**Editor's Note. —**

For a survey of decisions under the North Carolina Rules of Civil Procedure, see 50 N.C.L. Rev. 729 (1972).

For article discussing North Carolina jury

Standards for Determination, etc. —

Since the motion for judgment notwithstanding the verdict under this rule is simply a motion that judgment be entered in accordance with the movant's earlier motion for a directed verdict, notwithstanding the contrary verdict reached by the jury, the same standard of sufficiency of the evidence must be utilized in reviewing both motions. Snider v. Dickens, 293 N.C. 356, 237 S.E.2d 388 (1977).

The motion for judgment notwithstanding the verdict is technically only a renewal of the motion for a directed verdict made at the close of all the evidence, and thus the movant cannot assert grounds not included in the motion for directed verdict. Love v. Pressley, 34 N.C. App. 503, 239 S.E.2d 574 (1977).

Applied in Coggins v. Fox, 34 N.C. App. 138, 237 S.E.2d 332 (1977).

Cited in Harris, Upham & Co. v. Paliouras, 35 N.C. App. 458, 241 S.E.2d 863 (1978); Coltraine v. Pitt County Mem. Hosp., 35 N.C. App. 755, 242 S.E.2d 538 (1978).

instruction practice, see 52 N.C.L. Rev. 719 (1974).

Cited in State v. Wilkins, 34 N.C. App. 392, 238 S.E.2d 659 (1977).

Rule 52. Findings by the court.**Editor's Note. —**

For survey of 1976 case law on civil procedure, see 55 N.C.L. Rev. 914 (1977).

Reason for Finding of Facts, etc. —

A purpose of subsection (a)(1) of this rule is to assist the appellate courts in determining whether or not the trial court correctly found the facts and applied the law to them. O'Grady v. First Union Nat'l Bank, 35 N.C. App. 315, 241 S.E.2d 375 (1978).

Findings Not Required Unless Requested. —

Absent a request for findings of fact to support his decision on a motion, the judge is not required to find facts, and it is presumed that the judge, upon proper evidence, found facts to support this judgment. Allen v. Wachovia Bank & Trust Co., 35 N.C. App. 267, 241 S.E.2d 123 (1978).

Cited in Smathers v. Smathers, 34 N.C. App. 724, 239 S.E.2d 637 (1977).

ARTICLE 7.**Judgment.****Rule 54. Judgments.****Editor's Note. —**

For note discussing trial court discretion under section (b) of this rule, see 54 N.C.L. Rev. 1265 (1976).

For survey of 1976 case law on civil procedure, see 55 N.C.L. Rev. 914 (1977).

Rule 55. Default.

A motion to set aside a default is addressed, etc. —

The determination as to whether good cause exists to vacate an entry of default is addressed to the sound discretion of the trial judge. The judge's exercise of that discretion will not be disturbed on appeal unless a clear abuse of discretion is shown. *Frye v. Wiles*, 33 N.C. App. 581, 235 S.E.2d 889 (1977).

To set aside a default, etc. —

Under section (d) of this rule, all that needs to be shown to set aside an entry of default is good cause. *Frye v. Wiles*, 33 N.C. App. 581, 235 S.E.2d 889 (1977).

There is no necessity for a finding, etc. —

In setting aside an entry of default, as opposed to a default judgment, a showing of excusable neglect is not necessary. *Frye v. Wiles*, 33 N.C. App. 581, 235 S.E.2d 889 (1977).

Notice Under (b)(2) Inapplicable If No Appearance Made. — Subsection (b)(2), which requires that a defendant who has appeared in

the action be served with written notice of the application for a default judgment at least three days prior to the hearing on the application, is inapplicable where the defendant does not make an appearance in the action prior to the entry of default by the clerk or default judgment. *North Brook Farm Lines v. McBrayer*, 35 N.C. App. 34, 241 S.E.2d 74 (1978).

Liens established pursuant to Chapter 44A of the General Statutes are not "contractual security" within the meaning of subsection (b)(1) and a clerk or assistant clerk of court is without jurisdiction to make orders consummating foreclosure of liens established pursuant to Chapter 44A of the General Statutes. *Ridge Community Investors, Inc. v. Berry*, 293 N.C. 688, 239 S.E.2d 566 (1977).

Quoted in *Hickory White Trucks, Inc. v. Greene*, 34 N.C. App. 279, 237 S.E.2d 862 (1977).

Rule 56. Summary judgment.

Editor's Note. —

For a survey of decisions under the North Carolina Rules of Civil Procedure, see 50 N.C.L. Rev. 729 (1972).

For survey of 1976 case law on civil procedure, see 55 N.C.L. Rev. 914 (1977).

Rule Must Be Used Cautiously. —

In accord with 3rd paragraph in 1977 Cum. Supp. See *Emanuel v. Colonial Life & Accident Ins. Co.*, 35 N.C. App. 435, 242 S.E.2d 381 (1978).

It is only in the exceptional negligence case, etc. —

In accord with 5th paragraph in 1977 Cum. Supp. See *Forte v. Dillard Paper Co. of Raleigh, Inc.*, 35 N.C. App. 340, 241 S.E.2d 394 (1978).

The purpose of the summary judgment rule, etc. —

In accord with 13th paragraph in 1977 Cum. Supp. See *Carroll v. Rountree*, 34 N.C. App. 167, 237 S.E.2d 566 (1977).

In accord with 14th paragraph in 1977 Cum. Supp. See *Philbin Invs., Inc. v. Orb Enterprises, Ltd.*, 35 N.C. App. 622, 242 S.E.2d 176 (1978).

The purpose of the rule is not, etc. —

It is not within the purview of the summary judgment procedure for the court to resolve disputed material issues of fact. *Carroll v. Rountree*, 34 N.C. App. 167, 237 S.E.2d 566 (1977).

In accord with 3rd paragraph in 1977 Cum. Supp. See *Emanuel v. Colonial Life & Accident Ins. Co.*, 35 N.C. App. 435, 242 S.E.2d 381 (1978).

Court's Function on Motion, etc. —

It is not a part of the function of the court on

a motion for summary judgment to make findings of fact and conclusions of law. *Capps v. City of Raleigh*, 35 N.C. App. 290, 241 S.E.2d 527 (1978).

Party Need Not Move for Judgment in Order to Be Entitled to It. — Section (c) of this rule does not require that a party move for summary judgment in order to be entitled to it. *Greenway v. North Carolina Farm Bureau Mut. Ins. Co.*, 35 N.C. App. 308, 241 S.E.2d 339 (1978).

If there is a genuine issue of fact, etc. —

Summary judgment may not be granted if there is any genuine issue as to any material fact. *Gray v. American Express Co.*, 34 N.C. App. 714, 239 S.E.2d 621 (1977).

Motion Granted Only Where No Such Issue, etc. —

Where a party has shown that he is entitled to relief and the opposing party offers not even the slightest suggestion of a genuine issue of fact, the motion for summary judgment should be granted. *Carson v. Sutton*, 35 N.C. App. 720, 242 S.E.2d 535 (1978).

When Discovery Shows That Party Cannot Produce Evidence. — Summary judgment is appropriate when the moving party shows through discovery that the opposing party cannot produce evidence to support an essential element of his claim. *Dellinger v. Belk*, 34 N.C. App. 488, 238 S.E.2d 788 (1977).

A question of fact which is immaterial, etc. —

If there be a dispute as to an immaterial fact, summary judgment is not precluded. *Capps v.*

City of Raleigh, 35 N.C. App. 290, 241 S.E.2d 527 (1978).

The burden is on the moving party, etc. —

In accord with 1st paragraph in 1977 Cum. Supp. See *Five Star Enterprises, Inc. v. Russell*, 34 N.C. App. 275, 237 S.E.2d 859 (1977).

In accord with 3rd paragraph in 1977 Cum. Supp. See *Carson v. Sutton*, 35 N.C. App. 720, 242 S.E.2d 535 (1978).

In accord with 6th paragraph in 1977 Cum. Supp. See *Emanuel v. Colonial Life & Accident Ins. Co.*, 35 N.C. App. 435, 242 S.E.2d 381 (1978).

In accord with 8th paragraph in 1977 Cum. Supp. See *Harris v. Barham*, 35 N.C. App. 13, 239 S.E.2d 717 (1978).

Granting of summary judgment where the adverse party, etc. —

In accord with 2nd paragraph in 1977 Cum. Supp. See *Carson v. Sutton*, 35 N.C. App. 720, 242 S.E.2d 535 (1978).

Motion Granted on Basis of Party's Own Affidavits. —

In accord with 1st paragraph in 1977 Cum. Supp. See *Carson v. Sutton*, 35 N.C. App. 720, 242 S.E.2d 535 (1978).

Party Opposing Properly Supported Motion, etc. —

When a motion for summary judgment is made and properly supported, the adverse party may not rest upon the mere allegations or denials of his pleading. *Five Star Enterprises, Inc. v. Russell*, 34 N.C. App. 275, 237 S.E.2d 859 (1977).

In accord with 1st paragraph in 1977 Cum. Supp. See *Moore v. Galloway*, 35 N.C. App. 394, 241 S.E.2d 386 (1978).

But Must Set Forth Specific Facts, etc. —

The adverse party to a motion for summary judgment must by affidavit or otherwise, set forth specific facts showing that there is a genuine issue for trial. *Five Star Enterprises, Inc. v. Russell*, 34 N.C. App. 275, 237 S.E.2d 859 (1977).

Unpleaded defenses, when raised, etc. —

The nature of summary judgment procedure, coupled with the generally liberal rules relating to amendment of pleadings, require that unpleaded affirmative defenses be deemed part of the pleadings where such defenses are raised in a hearing on motion for summary judgment. *Cooke v. Cooke*, 34 N.C. App. 124, 237 S.E.2d 323 (1977).

Defense of laches is properly raised by summary judgment motion. *Capps v. City of Raleigh*, 35 N.C. App. 290, 241 S.E.2d 527 (1978).

Verified Pleading Treated as Affidavit. —

A verified pleading which meets all the requirements under subsection (e) of this rule may be used to show there is a genuine issue for trial. *Cities Serv. Oil Co. v. Howell Oil Co.*, 34 N.C. App. 295, 237 S.E.2d 921 (1977).

Findings of Fact on Motion. —

In accord with 4th paragraph in 1977 Cum.

Supp. See *Moore v. Galloway*, 35 N.C. App. 394, 241 S.E.2d 386 (1978).

In rare situations it can be helpful for the trial court to set out the undisputed facts which form the basis for his summary judgment. When that appears helpful or necessary, the court should let the judgment show that the facts set out therein are the undisputed facts. *Capps v. City of Raleigh*, 35 N.C. App. 290, 241 S.E.2d 527 (1978).

If the facts are not in dispute, there is no need to "find facts." If there is a need to "find facts," then summary judgment will not be appropriate if those facts are material. *Capps v. City of Raleigh*, 35 N.C. App. 290, 241 S.E.2d 527 (1978).

Partial Summary Judgment. —

Summary judgment may be entered upon less than the entire case. *High Point Bank & Trust Co. v. Morgan-Schultheiss, Inc.*, 33 N.C. App. 406, 235 S.E.2d 693, cert. denied, 293 N.C. 258, 237 S.E.2d 535 (1977).

Denial of Motion Not Ordinarily Appealable. —

Dictum at p. 582 of *Motyka v. Nappier*, 9 N.C. App. 579, 176 S.E.2d 858 (1970), that the moving party is free to preserve his exception to the denial of a motion for summary judgment for consideration on appeal from final judgment, should be disregarded. *Parker Oil Co. v. Smith*, 34 N.C. App. 324, 237 S.E.2d 882 (1977).

Denial of a motion for summary judgment ordinarily does not affect a substantial right so that appeal may be taken from the interlocutory order. *Parker Oil Co. v. Smith*, 34 N.C. App. 324, 237 S.E.2d 882 (1977).

Order Setting Aside Summary Judgment Is Interlocutory. — Order setting aside without prejudice a summary judgment on the grounds of procedural irregularity is interlocutory not immediately appealable. *Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 240 S.E.2d 338 (1978).

Res Judicata. —

An order denying summary judgment is not res judicata and a judge is clearly within his rights in vacating such denial. Where nothing pertinent to the motion has been filed subsequent to the previous order, it is not necessary to issue new notice. *Miller v. Miller*, 34 N.C. App. 209, 237 S.E.2d 552 (1977).

Applied in North Carolina Nat'l Bank v. Johnson Furn. Co., 34 N.C. App. 134, 237 S.E.2d 313 (1977); *Ellis v. Mullen*, 34 N.C. App. 367, 238 S.E.2d 187 (1977); *Jernigan v. Stokley*, 34 N.C. App. 358, 238 S.E.2d 318 (1977); *Albemarle Realty & Mtg. Co. v. Peoples Bank*, 34 N.C. App. 481, 238 S.E.2d 622 (1977); *Robinson v. City of Winston-Salem*, 34 N.C. App. 401, 238 S.E.2d 628 (1977); *Hanner v. Duke Power Co.*, 34 N.C. App. 737, 239 S.E.2d 594 (1977); *Faucette v. Griffin*, 35 N.C. App. 7, 239 S.E.2d 712 (1978); *Mitchell v. Republic Bank & Trust Co.*, 35 N.C. App. 101, 239 S.E.2d 867 (1978); *Pitts v. Village Inn Pizza*,

Inc., 35 N.C. App. 270, 241 S.E.2d 155 (1978); North Carolina Nat'l Bank v. Evans, 35 N.C. App. 322, 241 S.E.2d 379 (1978); Ralph Stachon & Assocs. v. Greenville Broadcasting Co., 35 N.C. App. 540, 241 S.E.2d 884 (1978).

Cited in Mason v. Andersen, 33 N.C. App. 568, 235 S.E.2d 880 (1977); Ward v. Hotpoint Div.,

Gen. Elec. Co., 35 N.C. App. 495, 241 S.E.2d 710 (1978); L.M. Brinkley & Assocs. v. Integon Life Ins. Corp., 35 N.C. App. 771, 242 S.E.2d 528 (1978).

Rule 58. Entry of judgment.

Applied in Arnold v. Varnum, 34 N.C. App. 22, 237 S.E.2d 272 (1977).

Rule 59. New trials; amendment of judgments.

Discretion of Court, etc. —

A motion to set aside the verdict and order a new trial is addressed to the discretion of the trial judge and his ruling thereon is irreviewable in the absence of manifest abuse of discretion. Townsend v. Norfolk & S. Ry., 35 N.C. App. 482, 241 S.E.2d 859 (1978).

A motion for a new trial under this rule is addressed to the sound discretion of the trial judge, whose ruling is not reviewable on appeal absent an abuse of discretion. Hoover v.

Kleer-Pak of N.C., Inc., 33 N.C. App. 661, 236 S.E.2d 386, cert. denied, 293 N.C. 360, 237 S.E.2d 848 (1977).

Quoted in State v. Johnson, 34 N.C. App. 328, 238 S.E.2d 313 (1977).

Cited in Arnold v. Varnum, 34 N.C. App. 22, 237 S.E.2d 272 (1977); Love v. Pressley, 34 N.C. App. 503, 239 S.E.2d 574 (1977).

Rule 60. Relief from judgment or order.

I. IN GENERAL.

Editor's Note. —

For survey of 1976 case law on civil procedure, see 55 N.C.L. Rev. 914 (1977).

For note discussing abandonment of appeal, see 56 N.C.L. Rev. 573 (1978).

This rule replaces, etc. —

In accord with 1977 Cum. Supp. See Hickory White Trucks, Inc. v. Greene, 34 N.C. App. 279, 237 S.E.2d 862 (1977).

And the cases interpreting, etc. —

In accord with 1977 Cum. Supp. See Hickory White Trucks, Inc. v. Greene, 34 N.C. App. 279, 237 S.E.2d 862 (1977).

The interest of deciding cases on the merits cannot outweigh all other considerations and entitle plaintiff to extraordinary relief under subsection (b) (6). Standard Equip. Co. v. Albertson, 35 N.C. App. 144, 240 S.E.2d 499 (1978).

Failure to Appear on Date Calendared for Trial. — Failure to retain counsel promptly or otherwise to maintain contact with the court, resulting in failure to appear on the date calendared for trial, should not be classified as excusable neglect of one's own lawsuit. Standard Equip. Co. v. Albertson, 35 N.C. App. 144, 240 S.E.2d 499 (1978).

Meritorious Defense, etc. —

In proceeding under either subsection (1) or (6)

of section (b) the movant must show that he has a meritorious defense. Sides v. Reid, 35 N.C. App. 235, 241 S.E.2d 110 (1978).

III. APPLICATION OF THE PRINCIPLES.

A. Neglect of Party.

Wife's Reliance on Husband's Assurances.

— In an action for nonpayment of an open account, excusable neglect was shown by the fact that the defendant wife relied upon her husband's assurances that he would take care of the matter and a meritorious defense was shown by the facts that the account ledger was in the name of her husband only, her name did not appear on the open account at all, and she had never received a demand for payment from plaintiff. Hickory White Trucks, Inc. v. Greene, 34 N.C. App. 279, 237 S.E.2d 862 (1977).

Effect of Wife Signing Installment Contract.

— Following a deficiency judgment on a consumer installment contract, the defendant wife showed excusable neglect by her reliance on her husband's verbal assurances that he would take care of the matter, but she failed to show a meritorious defense by admitting that she signed the consumer installment contract as a cocustomer, thereby acknowledging that she

became bound by the contract. *Hickory White Trucks, Inc. v. Greene*, 34 N.C. App. 279, 237 S.E.2d 862 (1977).

IV. PLEADING AND PRACTICE.

Where Movant Is Uncertain, etc. —

In accord with 1977 Cum. Supp. See *Sides v. Reid*, 35 N.C. App. 235, 241 S.E.2d 110 (1978).

Power of Court under Clause (6) of Section (b). —

Notwithstanding the broad equitable power of a trial court to vacate judgments pursuant to subsection (b)(6) of this rule, it should not grant such relief absent a showing based on competent evidence that justice requires it. *Sides v. Reid*, 35 N.C. App. 235, 241 S.E.2d 110 (1978).

While subsection (b)(6) has been described as a grand reservoir of equitable power to do justice in a particular case, it should not be a "catch-all" rule. *Standard Equip. Co. v. Albertson*, 35 N.C. App. 144, 240 S.E.2d 499 (1978).

Courts have the power to vacate judgments

when such action is appropriate, yet they should not do so under subsection (b)(6) except in extraordinary circumstances and after a showing that justice demands it. *Standard Equip. Co. v. Albertson*, 35 N.C. App. 144, 240 S.E.2d 499 (1978).

Discretion of Judge Not Reviewable, etc. —

In accord with 1st paragraph in 1977 Cum. Supp. See *Commercial Union Assurance Cos. v. Atwater Motor Co.*, 35 N.C. App. 397, 241 S.E.2d 334 (1978).

Applied in *Arnold v. Varnum*, 34 N.C. App. 22, 237 S.E.2d 272 (1977); *North Brook Farm Lines v. McBrayer*, 35 N.C. App. 34, 241 S.E.2d 74 (1978).

Cited in *Guthrie v. Ray*, 293 N.C. 67, 235 S.E.2d 146 (1977); *Jernigan v. Stokley*, 34 N.C. App. 358, 238 S.E.2d 318 (1977); *Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 240 S.E.2d 338 (1978); *Great Dane Trailers, Inc. v. North Brook Poultry, Inc.*, 35 N.C. App. 752, 242 S.E.2d 533 (1978).

Rule 62. Stay of proceedings to enforce a judgment.

Constitutionality. — Section 42-32, insofar as it allows additional damages of double rent, and § 42-34(b) insofar as it requires an undertaking in an amount not less than three months' rent, and section (a) of this rule insofar as it excepts summary ejectment cases from an automatic ten-day stay of execution of judgment, are unconstitutional and unenforceable. *Usher v. Waters Ins. & Realty Co.*, 438 F. Supp. 1215 (W.D.N.C. 1977).

Sections 42-34(b), 42-32, and section (a) of this rule are unconstitutional in that they (a) arbitrarily, irrationally and unequally burden and foreclose the right of tenants in summary ejectment to trial by jury and to a meaningful appeal and preclude such tenants from fairly pursuing their constitutional rights in the state courts, and (b) violate the Equal Protection Clause of the Fourteenth Amendment because of the discrimination they create between tenant-appellants on the one hand and civil appellants generally on the other hand. *Usher v. Waters Ins. & Realty Co.*, 438 F. Supp. 1215 (W.D.N.C. 1977).

The denial to tenants in summary ejectment of the automatic ten-day stay on execution which section (a) of this rule allows to other appellants is arbitrarily discriminatory. *Usher v. Waters Ins. & Realty Co.*, 438 F. Supp. 1215 (W.D.N.C. 1977).

Taken together, §§ 1A-1, section (a) of this

rule, 42-34(b), and 42-32 deny access to jury trial and place an unconstitutionally discriminatory burden upon less-than-affluent tenant-appellants in summary ejectment cases, in violation of the equal protection clause of the United States Constitution. *Usher v. Waters Ins. & Realty Co.*, 438 F. Supp. 1215 (W.D.N.C. 1977).

The combined effect of the three-month rent bond of § 42-34(b), the double rent penalty of § 42-32 and the entitlement of the landlord to immediate execution on a judgment of summary ejectment under section (a) of this rule is to make appeals difficult for all tenants and impossible for indigent tenants and to deprive indigent tenants of the right of trial by jury. These statutes and section (a) of this rule in effect extinguish the rights of indigent tenants to any meaningful appeal. *Usher v. Waters Ins. & Realty Co.*, 438 F. Supp. 1215 (W.D.N.C. 1977).

Since there are no jury trials in magistrates' courts, the three-month rent bond of § 42-34(b), the double rent penalty of § 42-32, and the entitlement of the landlord to immediate execution on a judgment of summary ejectment under section (a) of this rule, are obstacles to effective appeal to the district court which effectively deprive the indigent tenant of access to jury trial without justification or rationale adequate to survive a constitutional test. *Usher v. Waters Ins. & Realty Co.*, 438 F. Supp. 1215 (W.D.N.C. 1977).

ARTICLE 8.

Miscellaneous.

Rule 65. Injunctions.

Editor's Note. —

For article, "Should Security Be Required as a Pre-Condition to Provisional Injunctive Relief?," see 52 N.C.L. Rev. 1091 (1974).

Grounds for Temporary Injunction. —

In accord with 2nd paragraph in 1977 Cum. Supp. See *Herff Jones Co. v. Allegood*, 35 N.C. App. 475, 241 S.E.2d 700 (1978).

Hearing Takes Precedence over Hearing on Change of Venue. — This rule would appear to

require that a hearing on the return of a temporary restraining order take precedence over a hearing on a motion for a change of venue. *Herff Jones Co. v. Allegood*, 35 N.C. App. 475, 241 S.E.2d 700 (1978).

Applied in *Swenson v. All Am. Assurance Co.*, 33 N.C. App. 458, 235 S.E.2d 793 (1977).

Rule 84. Forms.

Editor's Note. — For a survey of decisions under the North Carolina Rules of Civil Procedure, see 50 N.C.L. Rev. 729 (1972).

Editor's Note. — The rule of the return of a temporary restraining order is a matter of procedure and not of substance. It is a matter of procedure because it is a matter of the form of the order and not of the substance of the order. It is a matter of substance because it is a matter of the substance of the order and not of the form of the order. The rule of the return of a temporary restraining order is a matter of procedure and not of substance. It is a matter of procedure because it is a matter of the form of the order and not of the substance of the order. It is a matter of substance because it is a matter of the substance of the order and not of the form of the order.

§ 5-3: Repealed by Session Laws 1977, c. 711, s. 83, effective July 1, 1978.

Editor's Note. —

Session Laws 1977, c. 711, s. 83, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 82, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without

regard to when a defendant's guilt was established or when judgment was entered against him except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

§ 5-4. Courts and officers empowered to punish.

Editor's Note. —

Session Laws 1977, c. 711, s. 83, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 82, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without

regard to when a defendant's guilt was established or when judgment was entered against him except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

Chapter 4.

Common Law.

§ 4-1. Common law declared to be in force.

Editor's Note. —

For article, "The Rule In Wild's Case in North Carolina," see 55 N.C.L. Rev. 751 (1977).

The solicitation of another to commit a felony, etc. —

The offense of solicitation of another to commit a felony has been cognizable at common law at least since *Rex v. Higgins*, 2 East 5, 102 Eng. Rep. 269 (1801) and is still an indictable offense under the common law in this State. *State v. Furr*, 292 N.C. 711, 235 S.E.2d 193 (1977).

In accord with original. See *State v. Furr*, 292 N.C. 711, 235 S.E.2d 193 (1977).

The gravamen of the offense of soliciting lies in counseling, enticing or inducing another to commit a crime. *State v. Furr*, 292 N.C. 711, 235 S.E.2d 193 (1977).

Indictment for Solicitation to Commit Felony. — The gist of the crime of solicitation of another to commit a felony is the solicitation itself and not the nature of the crime solicited. Thus, although it remains essential to the validity of the indictment that it advise the defendant of the nature and cause of the accusation sufficiently to allow him to meet it, to prepare for trial and to enable him to plead in bar of further prosecution after judgment, it is not necessary to allege with technical precision the nature of the solicitation. *State v. Furr*, 292 N.C. 711, 235 S.E.2d 193 (1977).

An indictment for soliciting to commit a felony

is analogous to one for conspiracy, in which it is sufficient to allege generally the object of the conspiracy. *State v. Furr*, 292 N.C. 711, 235 S.E.2d 193 (1977).

An indictment alleging defendant solicited another to murder is sufficient to take a case to the jury upon proof of solicitation to find someone else to commit murder, at least where there is nothing to indicate defendant insisted that someone other than the solicitee commit the substantive crime which is his object. *State v. Furr*, 292 N.C. 711, 235 S.E.2d 193 (1977).

What Constitutes New Offense of Solicitation. — A single solicitation of another to commit a felony may continue over a period of time and involve several contacts where the solicitee gives no definite refusal to the solicitor's request. But a definite refusal on the part of the solicitee plus the lapse of some time may end the transaction so that a new request upon another occasion may constitute a new offense. *State v. Furr*, 292 N.C. 711, 235 S.E.2d 193 (1977).

Crime of Solicitation to Commit Murder. — A request by a defendant that a named person find someone else to murder intended victims, and not that the named person himself commit the crime, constitutes the crime of solicitation to commit murder in this State. *State v. Furr*, 292 N.C. 711, 235 S.E.2d 193 (1977).

Stated in *State v. Fulcher*, 34 N.C. App. 233, 237 S.E.2d 909 (1977).

Chapter 5.**Contempt.****§ 5-1. Contempts enumerated; common law repealed.****I. GENERAL CONSIDERATION.****Editor's Note. —**

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without

regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

Cited in *State v. Locklear*, 294 N.C. 210, 241 S.E.2d 65 (1978).

§ 5-2: Repealed by Session Laws 1977, c. 711, s. 33, effective July 1, 1978.**Editor's Note. —**

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without

regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

§ 5-3: Repealed by Session Laws 1977, c. 711, s. 33, effective July 1, 1978.**Editor's Note. —**

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without

regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

§ 5-4. Punishment.**Editor's Note. —**

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without

regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

§ 5-5: Repealed by Session Laws 1977, c. 711, s. 33, effective July 1, 1978.**Editor's Note. —**

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without

regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

§ 5-6. Courts and officers empowered to punish.**Editor's Note. —**

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without

regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

§ 5-7: Repealed by Session Laws 1977, c. 711, s. 33, effective July 1, 1978.

Editor's Note. —

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without

regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

§ 5-8. Acts punishable as for contempt.

Editor's Note. —

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without

regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

Cited in State v. Locklear, 294 N.C. 210, 241 S.E.2d 65 (1978).

§ 5-9: Repealed by Session Laws 1977, c. 711, s. 33, effective July 1, 1978.

Editor's Note. —

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without

regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

Chapter 5A.

Contempt.

Editor's Note. —

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without

regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

Chapter 6.**Liability for Court Costs.****ARTICLE 3.***Civil Actions and Proceedings.***§ 6-21. Costs allowed either party or apportioned in discretion of court.****Editor's Note. —**

For survey of 1976 case law on wills, trusts and estates, see 55 N.C.L. Rev. 1109 (1977).

§ 6-21.1. Allowance of counsel fees as part of costs in certain cases.**Editor's Note. —**

For a note on the availability of general and punitive damages for an insurer's unjustified failure to pay policy benefits, see 13 Wake Forest L. Rev. 685 (1977).

This section, being remedial, etc. —

This section should be construed liberally by the presiding judge to accomplish the obvious purpose to provide relief for a person who has a claim so small that, if he must pay an attorney out of his recovery, it may not be economically feasible to bring suit. *DeBerry v. American Motorists Ins. Co.*, 33 N.C. App. 639, 236 S.E.2d 380 (1977).

Finding of Unwarranted Refusal to Pay, etc. —

Under this section to support an award for an

attorney fee from an insurance company the presiding judge must first find "an unwarranted refusal" to pay the claim. *DeBerry v. American Motorists Ins. Co.*, 33 N.C. App. 639, 236 S.E.2d 380 (1977).

Section Does Not Guarantee Compensation in All Cases. — While this section is aimed at encouraging injured parties to press their meritorious but pecuniarily small claims, it was not intended to encourage parties to refuse reasonable settlement offers and give rise to needless litigation by guaranteeing that counsel will, in all cases, be compensated. *Harrison v. Herbin*, 35 N.C. App. 259, 241 S.E.2d 108 (1978).

§ 6-21.2. Attorneys' fees in notes, etc., in addition to interest.**Editor's Note. —**

For survey of 1976 case law on commercial law, see 55 N.C.L. Rev. 943 (1977).

Applied in *Armstrong Mgt. Corp. v. Stanhagen*, 35 N.C. App. 571, 241 S.E.2d 713 (1978).

Chapter 7A.

Judicial Department.

SUBCHAPTER II. APPELLATE DIVISION OF THE GENERAL COURT OF JUSTICE.

Article 5. Jurisdiction.

Sec.

7A-27. Appeals of right from the courts of the trial divisions.

7A-31. Discretionary review by the Supreme Court.

SUBCHAPTER III. SUPERIOR COURT DIVISION OF THE GENERAL COURT OF JUSTICE.

Article 7. Organization.

7A-41. Superior court divisions and districts; judges; assistant district attorneys.

Article 9. District Attorneys and Judicial Districts.

7A-60. District attorneys and prosecutorial districts.

Article 12. Clerk of Superior Court.

7A-101. Compensation.

SUBCHAPTER IV. DISTRICT COURT DIVISION OF THE GENERAL COURT OF JUSTICE.

Article 13. Creation and Organization of the District Court Division.

7A-133. Numbers of judges by districts; numbers of magistrates and additional seats of court, by counties.

Article 16. Magistrates.

7A-171. Numbers; appointment and terms; vacancies.

7A-172. [Repealed.]

SUBCHAPTER II. APPELLATE DIVISION OF THE GENERAL COURT OF JUSTICE.

ARTICLE 5.

Jurisdiction.

§ 7A-27. Appeals of right from the courts of the trial divisions.

(b) From any final judgment of a superior court, other than one described in

SUBCHAPTER V. JURISDICTION AND POWERS OF THE TRIAL DIVISIONS OF THE GENERAL COURT OF JUSTICE.

Article 22.

Jurisdiction of the Trial Divisions in Criminal Actions.

Sec.

7A-271. Jurisdiction of superior court.

Article 23.

Jurisdiction and Procedure Applicable to Children.

7A-278. Definitions.

SUBCHAPTER VII. ADMINISTRATIVE MATTERS.

Article 29.

Administrative Office of the Courts.

7A-343.1. Distribution of copies of the appellate division reports.

SUBCHAPTER IX. REPRESENTATION OF INDIGENT PERSONS.

Article 36.

Entitlement of Indigent Persons Generally.

7A-451. Scope of entitlement.

7A-452. Source of counsel; fees; compensation of standby counsel.

Article 37.

The Public Defender.

7A-465. Public defender; defender districts; qualifications; compensation.

subsection (a) of this section, or one based on a plea of guilty or nolo contendere, including any final judgment entered upon review of a decision of an administrative agency, appeal lies of right to the Court of Appeals.
(1977, c. 711, s. 4.)

Editor's Note. —

The 1977 amendment, effective July 1, 1978, deleted "or one entered in a post-conviction hearing under Article 22 of Chapter 15" following "nolo contendere" in subsection (b).

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

Session Laws 1977, c. 711, s. 36, contains a severability clause.

Because of the postponed effective date of the 1977 amendment, subsection (b) as amended was not set out in the text in the 1977 Cumulative Supplement, but was carried in a note. The amended subsection (b) is therefore set out in this 1978 Interim Supplement.

As the rest of the section was not changed by the amendment, only subsection (b) is set out.

"Interlocutory Order". — An order is interlocutory if it does not determine the issues but directs some further proceeding preliminary to final decree. *Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 240 S.E.2d 338 (1978).

When Interlocutory Order Appealable Generally. —

This section in effect provides that no appeal lies to an appellate court from an interlocutory order or ruling of the trial judge unless such ruling or order deprives the appellant of a substantial right which he would lose if the ruling or order is not reviewed before final judgment. *Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 240 S.E.2d 338 (1978).

Order granting the right of intervention is not appealable, as any of the original parties may appeal from an adverse decision granting the intervenor relief on the merits. *Wood v. City of Fayetteville*, 35 N.C. App. 738, 242 S.E.2d 640 (1978).

An order granting intervention may be reviewed upon appeal from the final judgment

in the cause. *Wood v. City of Fayetteville*, 35 N.C. App. 738, 242 S.E.2d 640 (1978).

Although the rule is not absolute, ordinarily no appeal will lie from an order permitting intervention of parties unless the order adversely affects a substantial right which the appellant may lose if not granted an appeal before final judgment. The rule applies with equal vigor without regard to whether the trial court grants a motion to intervene as a matter of right pursuant to § 1A-1, Rule 24(a) or as permissive intervention pursuant to § 1A-1, Rule 24(b). *Wood v. City of Fayetteville*, 35 N.C. App. 738, 242 S.E.2d 640 (1978).

An order setting aside without prejudice a summary judgment on the grounds of procedural irregularity, is interlocutory and not immediately appealable. *Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 240 S.E.2d 338 (1978).

Denial of motion to amend answer to allege compulsory counterclaim affects a substantial right and is immediately appealable. *Hudspeth v. Bunzey*, 35 N.C. App. 231, 241 S.E.2d 119 (1978).

Petitions to Review Judgments in Habeas Corpus Proceedings. — By analogy, subsection (a) of this section, § 15-180.2 and App. R. 21(b) are logically applicable to petitions for certiorari to review judgments in habeas corpus proceedings involving the restraint of prisoners under sentences of death or life imprisonment. *State v. Niccum*, 293 N.C. 276, 238 S.E.2d 141 (1977).

Cited in *State v. Perry*, 293 N.C. 97, 235 S.E.2d 52 (1977); *State v. White*, 293 N.C. 91, 235 S.E.2d 55 (1977); *State v. Bishop*, 293 N.C. 84, 235 S.E.2d 214 (1977); *State v. Cole*, 293 N.C. 328, 237 S.E.2d 814 (1977); *State v. Constance*, 293 N.C. 581, 238 S.E.2d 294 (1977); *State v. Cates*, 293 N.C. 462, 238 S.E.2d 465 (1977); *State v. Foster*, 293 N.C. 674, 239 S.E.2d 449 (1977); *State v. Garrison*, 294 N.C. 270, 240 S.E.2d 377 (1978); *State v. Lester*, 294 N.C. 220, 240 S.E.2d 391 (1978); *State v. Hill*, 294 N.C. 320, 240 S.E.2d 794 (1978); *State v. Smith*, 294 N.C. 365, 241 S.E.2d 674 (1978); *Digsby v. Gregory*, 35 N.C. App. 59, 240 S.E.2d 491 (1978).

§ 7A-28: Repealed by Session Laws 1977, c. 711, s. 33, effective July 1, 1978.

Editor's Note. —

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall

become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered

against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

§ 7A-30. Appeals of right from certain decisions of the Court of Appeals.

Cited in *State ex rel. Comm'r of Ins. v. North Carolina Auto. Rate Administrative Office*, 293 N.C. 365, 239 S.E.2d 48 (1977); *State v. Boone*, 293 N.C. 702, 239 S.E.2d 459 (1977); *State v. Hewitt*, 294 N.C. 316, 239 S.E.2d 833 (1978); *State v. McKoy*, 294 N.C. 134, 240 S.E.2d 383

(1978); *State v. Lee*, 294 N.C. 299, 240 S.E.2d 449 (1978); *State v. Walters*, 294 N.C. 311, 240 S.E.2d 628 (1978); *Thompson v. Frank lx & Sons*, 294 N.C. 358, 240 S.E.2d 783 (1978); *State v. Sanders*, 294 N.C. 337, 240 S.E.2d 788 (1978).

§ 7A-31. Discretionary review by the Supreme Court. — (a) In any cause in which appeal has been taken to the Court of Appeals, except a cause appealed from the North Carolina Utilities Commission or the North Carolina Industrial Commission, the Supreme Court may in its discretion, on motion of any party to the cause or on its own motion, certify the cause for review by the Supreme Court, either before or after it has been determined by the Court of Appeals. A cause appealed to the Court of Appeals from the Utilities Commission or the Industrial Commission may be certified in similar fashion but only after determination of the cause in the Court of Appeals. The effect of such certification is to transfer the cause from the Court of Appeals to the Supreme Court for review by the Supreme Court. If the cause is certified for transfer to the Supreme Court before its determination in the Court of Appeals, review is not had in the Court of Appeals but the cause is forthwith transferred for review in the first instance by the Supreme Court. If the cause is certified for transfer to the Supreme Court after its determination by the Court of Appeals, the Supreme Court reviews the decision of the Court of Appeals.

The State may move for the certification for review of any criminal cause, but only after determination of the cause by the Court of Appeals.

(1977, c. 711, s. 5.)

Editor's Note. —

The 1977 amendment, effective July 1, 1978, deleted "and except a cause involving review of a post-conviction proceeding under Article 22, Chapter 15" following "Industrial Commission" in the first sentence of subsection (a).

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

Session Laws 1977, c. 711, s. 36, contains a

severability clause.

Because of the postponed effective date of the 1977 amendment, subsection (a) of this section as amended was not set out in the text in the 1977 Cumulative Supplement, but was carried in a note. The amended subsection (a) is therefore set out in this 1978 Interim Supplement.

As the rest of the section was not changed by the amendment, only subsection (a) is set out.

For note discussing the right to counsel on discretionary appeal, see 53 N.C.L. Rev. 560 (1974).

Cited in *State v. Cole*, 293 N.C. 328, 237 S.E.2d 814 (1977); *State v. Wills*, 293 N.C. 546, 240 S.E.2d 328 (1977); *Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 240 S.E.2d 338 (1978).

§ 7A-32. Power of Supreme Court and Court of Appeals to issue remedial writs.

Cited in *Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 240 S.E.2d 338 (1978).

SUBCHAPTER III. SUPERIOR COURT DIVISION OF THE GENERAL COURT OF JUSTICE.

ARTICLE 7.

Organization.

§ 7A-41. Superior court divisions and districts; judges; assistant district attorneys. — The counties of the State are organized into four judicial divisions and 30 [33] judicial districts, and each district has the counties, the number of regular resident superior court judges, and the number of full-time assistant district attorneys set forth in the following table:

Judicial Division	Judicial District	Counties	No. of Resident Judges	No. of Full-Time Asst. District Attorneys
First	1	Camden, Chowan, Currituck, Dare, Gates, Pasquotank, Perquimans	1	3
	2	Beaufort, Hyde, Martin, Tyrrell, Washington	1	3
	3	Carteret, Craven, Pamlico, Pitt	2	7
	4	Duplin, Jones, Onslow, Sampson	2	7
	5	New Hanover, Pender	2	6
	6	Bertie, Halifax, Hertford, Northampton	1	3
	7	Edgecombe, Nash, Wilson	2	4
	8	Greene, Lenoir, Wayne	2	6
Second	9	Franklin, Granville, Person, Vance, Warren	1	3
	10	Wake	4	12
	11	Harnett, Johnston, Lee	1	4
	12	Cumberland, Hoke	3	9
	13	Bladen, Brunswick, Columbus	1	3
	14	Durham	3	6
	15A	Alamance	1	3
	15B	Orange Chatham	1	3
	16	Robeson, Scotland	1	5

Judicial Division	Judicial District	Counties	No. of Resident Judges	No. of Full-Time Asst. District Attorneys
Third	17	Caswell, Rockingham, Stokes, Surry	1	4
	18	Guilford	3	12
	19A	Cabarrus, Rowan	2	4
	19B	Montgomery, Randolph	1	3
	20	Anson, Moore, Richmond, Stanly, Union	2	7
	21	Forsyth	2	8
	22	Alexander, Davidson, Davie, Iredell	2	5
	23	Alleghany, Ashe, Wilkes, Yadkin	1	2
Fourth	24	Avery, Madison, Mitchell, Watauga, Yancey	1	2
	25	Burke, Caldwell, Catawba	2	6
	26	Mecklenburg	5	15
	27A	Gaston	2	5
	27B	Cleveland Lincoln	1	3
	28	Buncombe	2	4
	29	Henderson, McDowell, Polk, Rutherford, Transylvania	1	3
	30	Cherokee, Clay, Graham, Haywood, Jackson, Macon, Swain	1	3

In a district having more than one regular resident judge, the judge who has the most continuous service on the superior court is the senior regular resident superior court judge. If two judges are of equal seniority, the oldest judge is the senior regular resident judge. In a single-judge district, the single judge is the senior regular resident judge.

Senior regular resident judges and regular resident judges possess equal judicial jurisdiction, power, authority and status, but all duties placed by the Constitution or statutes on the resident judge of a judicial district, including the appointment to and removal from office, which are not related to a case, controversy, or judicial proceeding and which do not involve the exercise of judicial power, shall be discharged by the senior regular resident judge. A senior regular resident superior court judge in a multi-judge district, by notice in

writing to the Administrative Officer of the Courts, may decline to exercise the authority vested in him by this section, in which event such authority shall be exercised by the regular resident judge next senior in point of service or age, respectively.

In the event the senior regular resident judge of a multi-judge district is unable, due to mental or physical incapacity, to exercise the authority vested in him by the statute, and the Chief Justice, in his discretion, has determined that such incapacity exists, the Chief Justice shall appoint an acting senior regular resident judge from the other regular resident judges of the district, to exercise, temporarily, the authority of the senior regular resident judge. Such appointee shall serve at the pleasure of the Chief Justice and until his temporary appointment is vacated by appropriate order. (1969, c. 1190, s. 4; 1971, c. 377, s. 5; c. 997; 1973, c. 47, s. 2; c. 646; c. 855, s. 1; 1975, c. 529; c. 956, ss. 1, 2; 1975, 2nd Sess., c. 983, s. 114; 1977, c. 1119, ss. 1, 3, 4; c. 1130, ss. 1, 2; 1977, 2nd Sess., c. 1238, s. 1; c. 1243, s. 4.)

Editor's Note. —

Session Laws 1977, c. 1130, s. 1, effective July 15, 1977, substituted the listings for districts 15A and 15B for a listing for district 15.

Session Laws 1977, c. 1130, s. 2, substituted the listings for districts 27-A and 27-B for a listing for district 27. Session Laws 1977, c. 1130, s. 2, was originally made effective Jan. 1, 1979, but was amended by Session Laws 1977, 2nd Sess., c. 1219, s. 43.1, so as to change the effective date to July 1, 1978.

The first 1977, 2nd Sess., amendment, effective Jan. 1, 1979, substituted the listings for judicial districts 19A and 19B for a listing for judicial district 19.

The second 1977, 2nd Sess., amendment, effective July 1, 1978, increased the number of full-time assistant district attorneys in district 15B from two to three and in district 18 from 10 to 12.

Session Laws 1977, 2nd Sess., c. 1219, s. 57, contains a severability clause.

ARTICLE 9.

District Attorneys and Judicial Districts.

§ 7A-60. District attorneys and prosecutorial districts.

(b) Effective July 1, 1975, the twenty-seventh prosecutorial district is divided into two prosecutorial districts, to be known as Prosecutorial Districts 27-A and 27-B. District 27-A shall consist of Gaston County, and District 27-B shall consist of Cleveland and Lincoln Counties. The current district attorney of the twenty-seventh prosecutorial district shall become the district attorney of Prosecutorial District 27-B, and the senior regular resident superior court judge shall appoint a district attorney for Prosecutorial District 27-A. The appointee shall serve until January 1, 1977, and his successor shall be chosen in the general election of November, 1976. The successor shall serve for the remainder of the term expiring December 31, 1978.

Effective July 15, 1977, the fifteenth prosecutorial district is divided into two prosecutorial districts, to be known as Prosecutorial Districts 15A and 15B. District 15A shall consist of Alamance County, and District 15B shall consist of Orange and Chatham Counties. The current district attorney of the fifteenth prosecutorial district shall become the district attorney for Prosecutorial District 15A, and the Governor shall appoint a district attorney for Prosecutorial District 15B. The appointee shall serve until January 1, 1979, and his successor shall be chosen in the general election of November 1978, to serve a four-year term beginning January 1, 1979.

Effective January 1, 1979, the nineteenth prosecutorial district is divided into two prosecutorial districts, to be known as Prosecutorial Districts 19A and 19B. District 19A shall consist of Cabarrus and Rowan Counties, and District 19B shall consist of Montgomery and Randolph Counties. The current district

attorney of the nineteenth prosecutorial district shall become the district attorney for Prosecutorial District 19A, and the Governor shall appoint a district attorney for Prosecutorial District 19B. The appointee shall serve until January 1, 1981, and his successor shall be chosen in the general election of November 1980, to serve a four-year term beginning January 1, 1981. (1967, c. 1049, s. 1; 1975, c. 956, s. 4; 1977, c. 1130, s. 3; 1977, 2nd Sess., c. 1238, s. 2.)

Editor's Note.
The 1977, 2nd Sess., amendment, effective July 1, 1978, added the third paragraph to

subsection (b).
As subsection (a) was not changed by the amendment, it is not set out.

ARTICLE 11.

Special Regulations.

§ 7A-95. Reporting of trials.

Cited in State v. Wray, 35 N.C. App. 682, 242 S.E.2d 635 (1978).

ARTICLE 12.

Clerk of Superior Court.

§ 7A-101. Compensation. — The clerk of superior court is a full-time employee of the State and shall receive an annual salary, payable in equal monthly installments, based on the population of the county, as determined by the 1970 federal decennial census, according to the following schedule:

Population	Salary
Less than 10,000	\$13,000
10,000 to 19,999	16,500
20,000 to 49,999	19,500
50,000 to 99,999	22,500
100,000 to 199,000 [199,999]	25,500
200,000 and above	31,000

When a county changes from one population group to another as a result of any future decennial census, the salary of the clerk shall be changed to the salary appropriate for the new population group on July 1 of the first full biennium subsequent to the taking of the census (July 1, 1981; July 1, 1991; etc.), except that the salary of an incumbent clerk shall not be decreased by any change in population group during his continuance in office.

The clerk shall receive no fees or commission by virtue of his office. The salary set forth in this section is the clerk's sole official compensation, but if, on June 30, 1975, the salary of a particular clerk, by reason of previous but no longer authorized merit increments, is higher than that set forth in the table, that higher salary shall not be reduced during his continuance in office. (1965, c. 310, s. 1; 1967, c. 691, s. 5; 1969, c. 1186, s. 3; 1971, c. 877, ss. 1, 2; 1973, c. 571, ss. 1, 2; 1975, c. 956, s. 7; 1975, 2nd Sess., c. 983, s. 11; 1977, c. 802, s. 42; 1977, 2nd Sess., c. 1136, s. 13.)

Editor's Note. —
The 1977, 2nd Sess., amendment, effective July 1, 1978, increased all salaries in the schedule. The 1977, 2nd Sess., amendatory act retained the figure "one hundred ninety-nine

thousand" instead of "one hundred ninety-nine, nine hundred ninety-nine thousand" in the next-to-last line of the schedule.
Session Laws 1977, 2nd Sess., c. 1136, s. 45, contains a severability clause.

§ 7A-102. Assistant and deputy clerks; appointment; number; salaries; duties.

Stated in *Ridge Community Investors, Inc. v. Berry*, 293 N.C. 688, 239 S.E.2d 566 (1977).

**SUBCHAPTER IV. DISTRICT COURT DIVISION OF THE
GENERAL COURT OF JUSTICE.**

ARTICLE 13.

Creation and Organization of the District Court Division.

§ 7A-133. Numbers of judges by districts; numbers of magistrates and additional seats of court, by counties. — Each district court district shall have the numbers of judges and each county within the district shall have the numbers of magistrates and additional seats of court, as set forth in the following table:

District	Judges	County	Magistrates Min.-Max.		Additional Seats of Court
1	2	Camden	1	2	
		Chowan	2	3	
		Currituck	1	2	
		Dare	2	3	
		Gates	2	3	
		Pasquotank	3	4	
		Perquimans	2	3	
2	2	Martin	5	7	
		Beaufort	4	5	
		Tyrrell	1	2	
		Hyde	2	3	
		Washington	3	4	
		Craven	7	9	
3	5	Pitt	10	12	Farmville Ayden
		Pamlico	2	3	
		Carteret	5	8	
4	4	Sampson	6	8	
		Duplin	9	10	
		Jones	2	3	
		Onslow	8	10	
		New Hanover	6	9	
5	3	Pender	4	6	
6	3	Northampton	5	6	
		Halifax	9	13	Roanoke Rapids, Scotland Neck
		Bertie	4	5	
		Hertford	5	6	

District	Judges	County	Magistrates Min.-Max.		Additional Seats of Court
7	4	Nash	7	10	Rocky Mount
		Edgecombe	4	6	Rocky Mount
		Wilson	4	6	
8	5	Wayne	5	7	Mount Olive
		Greene	2	4	
		Lenoir	4	7	La Grange
9	4	Person	3	4	
		Granville	3	5	
		Vance	3	4	
		Warren	3	4	
		Franklin	3	5	
10	6	Wake	12	16	Apex Wendell Fuquay-Varina
11	4	Harnett	7	10	Dunn
		Johnston	10	12	Benson and Selma
12	5	Lee	4	6	
		Cumberland	10	15	
		Hoke	4	5	
13	3	Bladen	4	6	
		Brunswick		6	
		Columbus	6	8	Tabor City
14	3	Durham	8	10	
15A	3	Alamance	7	9	Burlington
15B	2	Orange	4	8	Chapel Hill
		Chatham	3	6	Siler City
16	4	Robeson	8	14	Fairmont
					Maxton
					Pembroke
					Red Springs
					Rowland
					St. Pauls
17	4	Scotland	2	3	
		Caswell	2	4	
		Rockingham	4	8	Reidsville Eden Madison
18	8	Stokes	2	3	
		Surry	5	8	Mt. Airy
		Guilford	20	25	High Point
19A	4	Cabarrus	5	8	Kannapolis
		Rowan	5	9	
19B	2	Montgomery	2	3	
		Randolph	5	8	Liberty
20	4	Stanly	5	6	
		Union	4	6	
		Anson	4	5	
		Richmond	5	6	Hamlet
		Moore	5	7	Southern Pines
21	5	Forsyth	3	15	Kernersville

District	Judges	County	Magistrates Min.-Max.		Additional Seats of Court
22	4	Alexander	2	3	Thomasville
		Davidson	7	10	
		Davie	2	3	
23	3	Iredell	4	8	Mooresville
		Alleghany	1	2	
		Ashe	3	4	
		Wilkes	4	6	
24	2	Yadkin	2	3	
		Avery	3	4	
		Madison	4	5	
		Mitchell	3	4	
25	5	Watauga	5	6	
		Yancey	2	3	
		Burke	4	6	
		Caldwell	4	7	
26	8	Catawba	6	9	Hickory
		Mecklenburg	15	25	
27A	4	Gaston	11	19	
27B	2	Cleveland	5	8	
		Lincoln	4	6	
28	4	Buncombe	6	12	
29	3	Henderson	4	6	
		McDowell	3	4	
		Polk	3	4	
		Rutherford	6	8	
30	3	Transylvania	2	3	
		Cherokee	3	4	
		Clay	1	2	
		Graham	2	3	
		Haywood	5	7	
		Jackson	3	4	
		Macon	3	4	
		Swain	2	3	Canton

(1965, c. 310, s. 1; 1967, c. 691, s. 8; 1969, c. 1190, s. 10; c. 1254; 1971, c. 377, s. 7; cc. 727, 840, 841, 842, 843, 865, 866, 898; 1973, cc. 132, 373, 483; c. 838, s. 1; c. 1376; 1975, c. 956, ss. 8, 10; 1977, cc. 121, 122; c. 678, s. 2; c. 947, s. 1; c. 1130, ss. 4, 5; 1977, 2nd Sess., c. 1238, s. 3; c. 1243, ss. 3, 6.)

Editor's Note. —

Session Laws 1977, c. 1130, s. 4, effective July 15, 1977, substituted the listings for districts 15A and 15B for a listing for district 15.

Session Laws 1977, c. 1130, s. 5, substituted the listings for districts 27A and 27B for a listing for district 27. Session Laws 1977, c. 1130, s. 5, was originally made effective Jan. 1, 1979, but was amended by Session Laws 1977, 2nd Sess., c. 1219, s. 43.2, so as to change the effective date to July 1, 1978.

The first 1977, 2nd Sess., amendment, effective Jan. 1, 1979, substituted the listings for the districts 19A and 19B for a listing for district 19.

The second 1977, 2nd Sess., amendment, effective July 1, 1978, increased the number of magistrates in Ashe, Avery, Gaston, Lincoln, Madison and Surry Counties, and the number of judges in district 23.

Session Laws 1977, c. 1130, s. 4, effective July 15, 1977, provides, in part: "The additional

district court judge authorized by this act for district fifteen-A shall be appointed by the Governor to serve until the first Monday in December 1980. The appointee's successor shall be chosen in a general election of November 1980 to serve a four-year term beginning the first Monday in December 1980."

Session Laws 1977, c. 1130, s. 5, effective July 1, 1978, provides, in part: "The additional district court judge authorized by this act for district 27B shall be appointed by the Governor to serve until the first Monday in December 1980. The appointee's successor shall be chosen in the general election of November 1980, to serve a four-year term beginning the first Monday in December 1980."

Session Laws 1977, 2nd Sess., c. 1238, s. 4,

effective July 1, 1978 provides: "The additional district court judge authorized by this act for district 19B shall be appointed by the Governor to serve until the first Monday in December 1980. The appointee's successor shall be chosen in the general election of November 1980 to serve a four-year term beginning the first Monday in December 1980."

Because of the postponed effective date of Session Laws 1977, c. 1130, s. 5, the amendment in that section was not given effect in the text of this section in the 1977 Cumulative Supplement, but was carried in a note. The amendment is given effect in this 1978 Interim Supplement.

Session Laws 1977, 2nd Sess., c. 1219, s. 57, contains a severability clause.

ARTICLE 14.

District Judges.

§ 7A-146. Administrative authority and duties of chief district judge.

Cited in *In re Nowell*, 293 N.C. 235, 237 S.E.2d 246 (1977).

§ 7A-148. Annual conference of chief district judges.

Cited in *In re Nowell*, 293 N.C. 235, 237 S.E.2d 246 (1977).

ARTICLE 16.

Magistrates.

§ 7A-171. Numbers; appointment and terms; vacancies.

(c) After the biennial appointment of the minimum quota of magistrates, additional magistrates in a number not to exceed, in total, the maximum quota established for each county may be appointed in the following manner. The chief district judge, with the approval of the Administrative Officer of the Courts, may certify to the clerk of superior court that the minimum quota is insufficient for the efficient administration of justice and that a specified additional number, not to exceed the maximum quota established for the county, is required. Within 15 days after the receipt of this certification the clerk of superior court shall submit to the senior regular resident superior court judge of his district the names of two (or more, if requested by the judge) nominees for each additional magisterial office. Within 15 days after receipt of the nominations the senior regular resident superior court judge shall from the nominations submitted appoint magistrates in the number specified in the certification. A magistrate so appointed shall serve a term commencing immediately and expiring on the same day as the terms of office of magistrates appointed to fill the minimum quota for the county.

(d) Within 30 days after a vacancy in the office of magistrate occurs the clerk of superior court shall submit to the senior regular resident superior court judge the names of two (or more, if so requested by the judge) nominees for the office vacated. Within 15 days after receipt of the nominations the senior regular resident superior court judge shall appoint from the nominations received a magistrate who shall take office immediately and shall serve for the remainder of the unexpired term. (1965, c. 310, s. 1; 1967, c. 691, s. 15; 1971, c. 84, s. 1; 1973, c. 503, s. 2; 1977, c. 945, ss. 3, 4.)

Editor's Note. —

Session Laws 1977, c. 945, s. 4, effective Sept. 1, 1978, deleted provisions relating to salaries in the second, third and fourth sentences of subsection (c), deleted the former first sentence of subsection (d), which read "A vacancy in the office of magistrate is filled in the following manner," and rewrote the former second sentence as the present first sentence and inserted "shall" preceding "serve" in the

present second sentence of subsection (d).

Because of the postponed effective date of the 1977 amendment, subsections (c) and (d) as amended were not set out in the text in the 1977 Cumulative Supplement, but were carried in a note. The amended subsections are therefore set out in this 1978 Interim Supplement.

As subsections (a) and (b) were not changed by the amendment in Session Laws 1977, c. 945, s. 4, they are not set out.

§ 7A-172: Repealed by Session Laws 1977, c. 945, s. 5, effective September 1, 1978.

Editor's Note. —

This section was repealed, effective Sept. 1, 1978, by Session Laws 1977, c. 945, s. 5, ratified July 1, 1977, and amended by Session Laws 1977, 2nd Sess., c. 1136, s. 12, ratified June 14, 1978, and effective July 1, 1978. The section as amended by the 1977 2nd Sess., act reads as follows: "Magistrates shall receive not less than one thousand two hundred dollars (\$1,200) and not more than twelve thousand one hundred sixty-eight dollars (\$12,168) per year."

Session Laws 1977, c. 945, s. 8, provides, in

part: "Sections 4 and 5 of this act shall become effective on September 1, 1978; however, salaries of magistrates serving on that date shall remain the same during the remainder of that term of office, and the salaries of magistrates appointed to serve between September 1, 1978, and December 31, 1978, shall be set in accordance with the statutes in existence prior to the date of effectiveness of these sections."

Session Laws 1977, 2nd Sess., c. 1136, s. 45, contains a severability clause.

ARTICLE 18.

District Court Practice and Procedure Generally.

§ 7A-194: Repealed by Session Laws 1977, c. 711, s. 33, effective July 1, 1978.

Editor's Note. — Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a

defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

ARTICLE 19.

Small Claim Actions in District Court.

§ 7A-211. Small claim actions assignable to magistrates.

Cited in *Usher v. Waters Ins. & Realty Co.*, 438 F. Supp. 1215 (W.D.N.C. 1977).

§ 7A-212. Judgment of magistrate in civil action improperly assigned or not assigned.

Cited in *Usher v. Waters Ins. & Realty Co.*,
438 F. Supp. 1215 (W.D.N.C. 1977).

§ 7A-213. Procedure for commencement of action; request for and notice of assignment.

Cited in *Usher v. Waters Ins. & Realty Co.*,
438 F. Supp. 1215 (W.D.N.C. 1977).

§ 7A-222. General trial practice and procedure.

Cited in *Usher v. Waters Ins. & Realty Co.*,
438 F. Supp. 1215 (W.D.N.C. 1977).

§ 7A-227. Stay of execution on appeal.

Quoted in *Usher v. Waters Ins. & Realty Co.*,
438 F. Supp. 1215 (W.D.N.C. 1977).

§ 7A-228. No new trial before magistrate; appeal for trial de novo; how appeal perfected; oral notice.

Cited in *Usher v. Waters Ins. & Realty Co.*,
438 F. Supp. 1215 (W.D.N.C. 1977).

§ 7A-229. Trial de novo on appeal.

Cited in *Usher v. Waters Ins. & Realty Co.*,
438 F. Supp. 1215 (W.D.N.C. 1977).

§ 7A-230. Jury trial on appeal.

Cited in *Usher v. Waters Ins. & Realty Co.*,
438 F. Supp. 1215 (W.D.N.C. 1977).

SUBCHAPTER V. JURISDICTION AND POWERS OF THE TRIAL DIVISIONS OF THE GENERAL COURT OF JUSTICE.

ARTICLE 20.

Original Civil Jurisdiction of the Trial Divisions.

§ 7A-240. Original civil jurisdiction generally.

Editor's Note. — For article, "Recognition of Foreign Judgments," see 50 N.C.L. Rev. 21 (1971).

For survey of 1976 case law on wills, trusts and estates, see 55 N.C.L. Rev. 1109 (1977).

Stated in *Ridge Community Investors, Inc. v.*

Berry, 293 N.C. 688, 239 S.E.2d 566 (1977).

Cited in *Grissom v. North Carolina Dep't of Revenue*, 34 N.C. App. 381, 238 S.E.2d 311 (1977); *North Brook Farm Lines v. McBrayer*, 35 N.C. App. 34, 241 S.E.2d 74 (1978).

§ 7A-241. Original jurisdiction in probate and administration of decedents' estates.

Editor's Note. — For article, "Recognition of Foreign Judgments," see 50 N.C.L. Rev. 21 (1971).

For survey of 1976 case law on wills, trusts and estates, see 55 N.C.L. Rev. 1109 (1977).

§ 7A-242. Concurrently held original jurisdiction allocated between trial divisions.

Editor's Note. — For article, "Recognition of Foreign Judgments," see 50 N.C.L. Rev. 21 (1971).

§ 7A-243. Proper division for trial of civil actions generally determined by amount in controversy.

Cited in *North Brook Farm Lines v. McBrayer*, 35 N.C. App. 34, 241 S.E.2d 74 (1978).

ARTICLE 22.

Jurisdiction of the Trial Divisions in Criminal Actions.

§ 7A-270. Generally.

State Has Burden to Show Jurisdiction. — When jurisdiction is challenged, in a criminal case, the State must carry the burden and show beyond a reasonable doubt that North Carolina has jurisdiction to try the accused. Former cases holding that a challenge to the jurisdiction is an affirmative defense with the burden of persuasion on the accused are no longer authoritative. *State v. Batdorf*, 293 N.C. 486, 238 S.E.2d 497 (1977).

The question of jurisdiction of the courts in

this State in a criminal case is not an independent, distinct, substantive matter of exemption, immunity or defense and ought not to be regarded as an affirmative defense on which the defendant must bear the burden of proof. Rather, jurisdiction is a matter which, when contested, should be proven by the prosecution as a prerequisite to the authority of the court to enter judgment. *State v. Batdorf*, 293 N.C. 486, 238 S.E.2d 497 (1977).

§ 7A-271. Jurisdiction of superior court. — (a) The superior court has exclusive, original jurisdiction over all criminal actions not assigned to the district court division by this Article, except that the superior court has

jurisdiction to try a misdemeanor:

- (1) Which is a lesser included offense of a felony on which an indictment has been returned, or a felony information as to which an indictment has been properly waived; or
 - (2) When the charge is initiated by presentment; or
 - (3) Which may be properly consolidated for trial with a felony under G.S. 15A-926;
 - (4) To which a plea of guilty or nolo contendere is tendered in lieu of a felony charge; or
 - (5) When a misdemeanor conviction is appealed to the superior court for trial de novo, to accept a guilty plea to a lesser-included or related charge.
- (1977, c. 711, s. 6.)

Editor's Note. —

The 1977 amendment, effective July 1, 1978, substituted "G.S. 15A-926" for "G.S. 15-152" in subdivision (3) of subsection (a).

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

Session Laws 1977, c. 711, s. 36, contains a severability clause.

Because of the postponed effective date of the 1977 amendment, subsection (a) as amended was not set out in the text in the 1977 Cumulative Supplement, but was carried in a note. The amended subsection is therefore set out in this 1978 Interim Supplement.

As the rest of the section was not changed by the amendment, it is not set out.

Presumption of Regular Procedure. — On appeal to the superior court from a conviction in the district court a presumption of regular procedure in the district court can be inferred. *State v. Joyner*, 33 N.C. App. 361, 235 S.E.2d 107 (1977).

Jurisdiction of the superior court on appeal

from a conviction in district court is derivative. *State v. Joyner*, 33 N.C. App. 361, 235 S.E.2d 107 (1977).

The entire record may be considered on appeal to the superior court from a conviction in the district court in searching for evidence that proper procedure was followed. *State v. Joyner*, 33 N.C. App. 361, 235 S.E.2d 107 (1977).

State Has Burden to Show Jurisdiction. — When jurisdiction is challenged, in a criminal case, the State must carry the burden and show beyond a reasonable doubt that North Carolina has jurisdiction to try the accused. Former cases holding that a challenge to the jurisdiction is an affirmative defense with the burden of persuasion on the accused are no longer authoritative. *State v. Batdorf*, 293 N.C. 486, 238 S.E.2d 497 (1977).

The question of jurisdiction of the courts in this State in a criminal case is not an independent, distinct, substantive matter of exemption, immunity or defense and ought not to be regarded as an affirmative defense on which the defendant must bear the burden of proof. Rather, jurisdiction is a matter which, when contested, should be proven by the prosecution as a prerequisite to the authority of the court to enter judgment. *State v. Batdorf*, 293 N.C. 486, 238 S.E.2d 497 (1977).

Applied in *State v. Cole*, 294 N.C. 304, 240 S.E.2d 355 (1978).

§ 7A-272. Jurisdiction of district court.

State Has Burden to Show Jurisdiction. — The question of jurisdiction of the courts in this State in a criminal case is not an independent, distinct, substantive matter of exemption, immunity or defense and ought not to be regarded as an affirmative defense on which the defendant must bear the burden of proof. Rather, jurisdiction is a matter which, when contested, should be proven by the prosecution as a prerequisite to the authority of the court to enter judgment. *State v. Batdorf*, 293 N.C. 486, 238 S.E.2d 497 (1977).

When jurisdiction is challenged, in a criminal case, the State must carry the burden and show beyond a reasonable doubt that North Carolina has jurisdiction to try the accused. Former cases holding that a challenge to the jurisdiction is an affirmative defense with the burden of persuasion on the accused are no longer authoritative. *State v. Batdorf*, 293 N.C. 486, 238 S.E.2d 497 (1977).

Applied in *State v. Cole*, 294 N.C. 304, 240 S.E.2d 355 (1978).

§ 7A-273. Powers of magistrates in criminal actions.

State Has Burden to Show Jurisdiction. — When jurisdiction is challenged, in a criminal case, the State must carry the burden and show beyond a reasonable doubt that North Carolina has jurisdiction to try the accused. Former cases holding that a challenge to the jurisdiction is an affirmative defense with the burden of persuasion on the accused are no longer authoritative. *State v. Batdorf*, 293 N.C. 486, 238 S.E.2d 497 (1977).

The question of jurisdiction of the court in this

State in a criminal case is not an independent, distinct, substantive matter of exemption, immunity or defense and ought not to be regarded as an affirmative defense on which the defendant must bear the burden of proof. Rather, jurisdiction is a matter which, when contested, should be proven by the prosecution as a prerequisite to the authority of the court to enter judgment. *State v. Batdorf*, 293 N.C. 486, 238 S.E.2d 497 (1977).

ARTICLE 22A.***Prohibited Orders.*****§ 7A-276.1. Court orders prohibiting publication or broadcast of reports of open court proceedings or reports of public records banned.****Editor's Note.** —

Session Laws 1977, c.711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without

regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

§ 7A-278. Definitions. — The terms or phrases used in this Article shall be defined as follows, unless the context or subject matter otherwise requires:

- (2) "Delinquent child" includes any child who has committed any criminal offense under State law or under an ordinance of local government, including violations of the motor vehicle laws.

(1975, c. 929.)

Editor's Note. —

The second 1975 amendment, effective July 1, 1978, deleted "or a child who has violated the conditions of his probation under this Article" at the end of subdivision (2). The amendment was originally made effective July 1, 1977, by Session Laws 1975, c. 929, s. 3. That section was amended by Session Laws 1977, c. 291, so as to postpone the effective date to July 1, 1978.

Because of the postponed effective date of the second 1975 amendment, subdivision (2) as amended was not set out in the text in the 1977 Cumulative Supplement, but was carried in a

note. The amended subdivision is therefore set out in this 1978 Interim Supplement.

As the rest of the section was not changed, only the introductory language and subdivision (2) are set out.

For article, "The Jurisdictional Dilemma of the Juvenile Court," see 51 N.C.L. Rev. 195 (1972).

For survey of 1976 case law on domestic relations, see 55 N.C.L. Rev. 1018 (1977).

Cited in *In re Berry*, 33 N.C. App. 356, 235 S.E.2d 278 (1977).

ARTICLE 23.***Jurisdiction and Procedure Applicable to Children.*****§ 7A-279. Juvenile jurisdiction.**

Jurisdiction Extends to Minor Who Becomes 16 Prior to Hearing. — The juvenile jurisdiction of the district court extends to a minor alleged to be delinquent who was under

16 years of age at the time of the commission of the criminal offense but who attains the age of 16 prior to any judicial hearing. Opinion of Attorney General to the Hon. Larry Thomas

Black, District Court Judge, Nov. 8, 1977.

§ 7A-280. Felony cases.

Editor's Note. — For article, "The Jurisdictional Dilemma of the Juvenile Court," see 51 N.C.L. Rev. 195 (1972).

Transfer of Case Is within Discretion of Judge. — This section leaves the decision on whether the case will be transferred to the superior court solely within the sound discretion of the district court judge who conducts the probable cause hearing. The exercise of that discretion is not subject to review in the absence of a showing of gross abuse. In re Bunn, 34 N.C. App. 614, 239 S.E.2d 483 (1977).

Findings of Fact Not Required for Transfer. — The judge is not required to make findings of

fact to support his conclusion that the needs of the juvenile or the best interest of the State would be served by transferring the case to the superior court division. It is only required that if he elects to order the transfer, he must state his reasons therefor. In re Bunn, 34 N.C. App. 614, 239 S.E.2d 483 (1977).

No Right to Particular Trial Division. — Neither the juvenile defendant nor the State has the right to have a felony case disposed of in a particular trial division of the General Court of Justice. In re Bunn, 34 N.C. App. 614, 239 S.E.2d 483 (1977).

§ 7A-285. Juvenile hearing.

Editor's Note. —

For survey of 1972 case law on the right to counsel for the "undisciplined child," see 51 N.C.L. Rev. 1023 (1973).

Constitutionality. — This section is constitutional and the defendant's due process rights were not violated when his juvenile hearing was conducted before a lay judge. In re Byers, 34 N.C. App. 710, 239 S.E.2d 618 (1977).

No right to Trial De Novo before Legally Trained Judge. — Appeal from a juvenile hearing conducted in the district courts lies

directly to the court of appeals, and a juvenile defendant does not have the right to a trial de novo in superior court before a legally trained judge. In re Byers, 34 N.C. App. 710, 239 S.E.2d 618 (1977).

Requirement that a juvenile make restitution as condition of probation must be supported by the record and appropriate findings of fact which demonstrate that the best interest of the juvenile will be promoted by the enforcement of the condition. In re Berry, 33 N.C. App. 356, 235 S.E.2d 278 (1977).

§ 7A-286. Disposition.

Jurisdiction Extends to Minor Who Becomes 16 Prior to Hearing. — The juvenile jurisdiction of a district court extends to a minor alleged to be delinquent who was under 16 years of age at the time of the commission of the criminal offense but who attains the age of 16 prior to any judicial hearing. Opinion of Attorney General to the Hon. Larry Thomas Black, District Court Judge, Nov. 8, 1977.

Disposition of Such Minor. — Where a minor was under the age of 16 at the time of the commission of a criminal offense but attained the age of 16 prior to the judicial hearing, the minor, if adjudicated delinquent, may be committed to the Department of Human Resources, Division of Youth Services, for institutional confinement "for a definite term or an indefinite term, not to extend beyond the eighteenth birthday of the child, as the Department [of Human Resources] or its administrative personnel may find to be in the best interest of the child. Opinion of Attorney General to the Hon. Larry Thomas Black, District Court Judge, Nov. 8, 1977.

The court has the discretion to place such a minor, adjudicated delinquent, on juvenile probation. Adult probation, however, is not an alternative available to the court. If such a minor, adjudicated delinquent, violates the terms of his probation, the court may commit him to the Department of Human Resources, Division of Youth Services, for institutional confinement. Opinion of Attorney General to the Hon. Larry Thomas Black, District Court Judge, Nov. 8, 1977.

Needs of Child Must Be Considered. — It is the legislative policy of this State that the judge consider the needs of the child in the disposition of a juvenile petition. In re Byers, 34 N.C. App. 710, 239 S.E.2d 618 (1977).

Requirement that a juvenile make restitution as condition of probation must be supported by the record and appropriate findings of fact which demonstrate that the best interest of the juvenile will be promoted by the enforcement of the condition. In re Berry, 33 N.C. App. 356, 235 S.E.2d 278 (1977).

ARTICLE 24A.

Delinquency Prevention and Youth Services.

§ 7A-289.13. Legislative intent.

Cross References. — As to the Youth Services Advisory Committee, see §§ 143B-207, 143B-208 in 1978 Replacement Volume 3C. As to the

codification of this Article, see Editor's Note under § 143B-207 in the 1978 Replacement Volume.

ARTICLE 25.

Jurisdiction and Procedure in Criminal Appeals from District Courts.

§ 7A-290. Appeals from district court in criminal cases; notice; appeal bond.

No Remand without Cause Or Consent of Defendant. — Where a defendant has appealed for trial de novo in superior court, a judge of that court has no authority, absent satisfactory cause shown or without the consent of the defendant, to dismiss the appeal and remand the case for compliance with the judgment of the district court. *State v. Fox*, 34 N.C. App. 576, 239 S.E.2d 471 (1977).

Waiver of Right of Appeal. — By acquiescing in the terms of the judgment of the district court by paying a fine and costs, defendant waived his statutory right of appeal to the superior court. *State v. Vestal*, 34 N.C. App. 610, 239 S.E.2d 275 (1977).

Right to Trial De Novo on Appeal after

Guilty Plea. — An accused in a criminal case is entitled to a trial de novo as a matter of right on appeal to the superior court from an inferior court, even when the accused entered a guilty plea in the inferior court. *State v. Fox*, 34 N.C. App. 576, 239 S.E.2d 471 (1977).

State Not Bound by Plea Bargain after Defendant Appeals. — Where a defendant originally charged with felonies entered guilty pleas to misdemeanors in the district court pursuant to a plea bargain with the State, but then appealed to the superior court for a trial de novo, the State was not bound by the agreement and could try the defendant upon the felony charges or any lesser included offenses. *State v. Fox*, 34 N.C. App. 576, 239 S.E.2d 471 (1977).

SUBCHAPTER VII. ADMINISTRATIVE MATTERS.

ARTICLE 29.

Administrative Office of the Courts.

§ 7A-343.1. **Distribution of copies of the appellate division reports.** — The Administrative Officer of the Courts shall, at the State's federal, distribute such number of copies of the appellate division reports to federal, State departments and agencies, and to educational institutions of instruction, as follows:

Governor, Office of the	1
Lieutenant Governor, Office of the	1
Secretary of State, Department of the	2
Treasurer, Department of the State	1
Superintendent of Public Instruction	1
Office of the Attorney General	11
State Bureau of Investigation	1
Agriculture, Department of	1
Labor, Department of	1
Insurance, Department of	1
Budget Bureau, Department of Administration	1
Property Control, Department of Administration	1
State Planning, Department of Administration	1
Board of Natural Resources and Community Development	1
Revenue, Department of	1
Board of Human Resources	1

Commission for the Blind	1
Board of Transportation	1
Motor Vehicles, Division of	1
Utilities Commission	8
Industrial Commission	11
Employment Security Commission	1
Commission of Correction	1
Parole Commission	1
Archives and History, Division of	1
Crime Control and Public Safety, Department of	2
State Library	3
Legislative Building Library	2
Justices of the Supreme Court	1 ea.
Judges of the Court of Appeals	1 ea.
Judges of the Superior Court	1 ea.
District Attorneys	1 ea.
Emergency and Special Judges of the Superior Court	1 ea.
Supreme Court Library	AS MANY AS REQUESTED
Appellate Division Reporter	1
University of North Carolina, Chapel Hill	71
University of North Carolina, Charlotte	1
University of North Carolina, Greensboro	1
University of North Carolina, Asheville	1
North Carolina State University, Raleigh	1
Appalachian State University	1
East Carolina University	1
Fayetteville State University	1
North Carolina Central University	17
Western Carolina University	1
Duke University	17
Davidson College	2
Wake Forest University	25
Lenoir Rhyne College	1
Elon College	1
Campbell College	17
Federal, Out-of-State and Foreign	
Secretary of State	1
Secretary of Defense	1
Secretary of Health, Education and Welfare	1
Secretary of Housing and Urban Development	1
Secretary of Transportation	1
Attorney General	1
Department of Justice	1
Internal Revenue Service	1
Veterans' Administration	1
Library of Congress	5
Federal Judges resident in North Carolina	1 ea.
Marshal of the United States Supreme Court	1
Federal District Attorneys resident in North Carolina	1 ea.
Federal Clerks of Court resident in North Carolina	1 ea.
Supreme Court Library exchange list	1

Each justice of the Supreme Court and judge of the Court of Appeals shall receive for his private use, one complete and up-to-date set of the appellate division reports. The copies of reports furnished each justice or judge as set out in the table above may be retained by him personally to enable him to keep up-to-date his personal set of reports. (1977, c. 379, s. 2; c. 771, s. 4; 1977, 2nd Sess., c. 1219, s. 31.)

Editor's Note. —

The 1977, 2nd Sess., amendment, effective July 1, 1978, added "Crime Control and Public Safety, Department of _____ 2" in the list of

agencies.

Session Laws 1977, 2nd Sess., c. 1219, s. 57, contains a severability clause.

ARTICLE 30.*Judicial Standards Commission.***§ 7A-375. Judicial Standards Commission.****Editor's Note. —**

For note on the Judicial Standards Commission, see 54 N.C.L. Rev. 1074 (1976).

For survey of 1976 case law dealing with administrative law, see 55 N.C.L. Rev. 898 (1977).

This Article is not unconstitutional because enacted in advance of the ratification of North Carolina Const., Art. IV, § 17, since the General Assembly has power to enact a statute not authorized by the present Constitution where the statute is passed in anticipation of an amendment authorizing it or provides that it shall take effect upon the adoption of such an amendment. In re Nowell, 293 N.C. 235, 237 S.E.2d 246 (1977).

Article Is Not Unconstitutional Delegation of Authority. — In view of the constitutional mandate in North Carolina Const., Art. IV, § 17(2) that the General Assembly shall prescribe a procedure for the censure and removal of judges in addition to impeachment and address as provided in § 17(1), respondent's contention that the General Assembly in enacting this Article abrogated its legislative duties by unconstitutionally delegating them to

the Judicial Standards Commission, a creature of the General Assembly, is without merit. In re Nowell, 293 N.C. 235, 237 S.E.2d 246 (1977).

Intent of Article. — By enacting this article it was the intent of the General Assembly to provide the machinery and prescribe the procedure for the censure and removal of justices and judges for willful misconduct in office, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute. In re Hardy, 294 N.C. 90, 240 S.E.2d 367 (1978).

The commission can neither censure nor remove. It functions as an arm of the court to conduct hearings for the purpose of aiding the Supreme Court in determining whether a judge is unfit or unsuitable. In re Hardy, 294 N.C. 90, 240 S.E.2d 367 (1978).

The recommendations of the commission are not binding upon the Supreme Court, which will consider the evidence on both sides and exercise its independent judgment as to whether it should censure, remove, or decline to do either. In re Hardy, 294 N.C. 90, 240 S.E.2d 367 (1978).

§ 7A-376. Grounds for censure or removal.

Editor's Note. — For note on the Judicial Standards Commission, see 54 N.C.L. Rev. 1074 (1976).

For survey of 1976 case law dealing with administrative law, see 55 N.C.L. Rev. 898 (1977).

Willful Misconduct Defined. —

Willful misconduct in office is the improper or wrongful use of the power of his office by a judge acting intentionally, or with gross unconcern for his conduct, and generally in bad faith. It involves more than an error of judgment or a mere lack of diligence. Necessarily, the term would encompass conduct involving moral turpitude, dishonesty or corruption, and also any knowing misuse of the office, whatever the motive. However, these elements are not necessary to a finding of bad faith. A specific

intent to use the powers of the judicial office to accomplish a purpose which the judge knew or should have known was beyond the legitimate exercise of his authority constitutes bad faith. In re Nowell, 293 N.C. 235, 237 S.E.2d 246 (1977).

Conduct Prejudicial to Administration of Justice, etc. —

A judge may commit indiscretions, or worse, in his private life which nonetheless brings the judicial office into disrepute. In re Nowell, 293 N.C. 235, 237 S.E.2d 246 (1977).

Willful misconduct in office of necessity is conduct prejudicial to the administration of justice that brings the judicial office into disrepute. However, a judge may also, through negligence or ignorance not amounting to bad faith, behave in a manner prejudicial to the administration of justice so as to bring the

judicial office into disrepute. In re Nowell, 293 N.C. 235, 237 S.E.2d 246 (1977).

Language of Section Not Too Nebulous or Subjective. — The phrases, "willful misconduct in office" and "conduct prejudicial to the administration of justice that brings the judicial office into disrepute," are no more nebulous or less objective than the reasonable and prudent man test which has been a part of State negligence law for centuries. In re Nowell, 293 N.C. 235, 237 S.E.2d 246 (1977).

Code of Judicial Conduct Is Guide. — The General Assembly intended the North Carolina Code of Judicial Conduct to be a guide to the meaning of this section. In re Nowell, 293 N.C. 235, 237 S.E.2d 246 (1977).

Section 7A-377 in Pari Materia. — The provisions of this section and § 7A-377 are parts of the same enactment, relate to the same class of persons and are aimed at suppression of the same evil. The statutes are therefore in pari materia and must be construed accordingly. In re Hardy, 294 N.C. 90, 240 S.E.2d 367 (1978).

Censure Is Not Punishment. — Albeit serious, censure and removal are not to be regarded as punishment but as the legal consequences attached to adjudged judicial misconduct or unfitness. In re Nowell, 293 N.C. 235, 237 S.E.2d 246 (1977).

The commission can neither censure nor remove. It functions as an arm of the court to conduct hearings for the purpose of aiding the Supreme Court in determining whether a judge is unfit or unsuitable. In re Hardy, 294 N.C. 90, 240 S.E.2d 367 (1978).

The recommendations of the commission are not binding upon the Supreme Court, which will consider the evidence on both sides and exercise its independent judgment as to whether it should censure, remove or decline to do either. In re Hardy, 294 N.C. 90, 240 S.E.2d 367 (1978).

Court's Options in Disposing of Commission Recommendation. — When this section and

§ 7A-377 are read aright they provide that upon recommendation of the Judicial Standards Commission the Supreme Court may censure or remove any justice or judge, may approve or reject the recommendation of the commission, or may remand the matter for further proceedings. In re Hardy, 294 N.C. 90, 240 S.E.2d 367 (1978).

This section and § 7A-377 authorize and empower the Supreme Court, unfettered in its adjudication by the recommendation of the commission, to make the final judgment whether to censure, remove, remand for further proceedings or dismiss the proceeding. In re Hardy, 294 N.C. 90, 240 S.E.2d 367 (1978).

All options listed in this section and § 7A-377 are permissive options available to the Supreme Court in disposing of any disciplinary proceeding. In re Hardy, 294 N.C. 90, 240 S.E.2d 367 (1978).

The Supreme Court is authorized and empowered to order the removal of a judge when the Judicial Standards Commission has only recommended that the judge be censured. In re Hardy, 294 N.C. 90, 240 S.E.2d 367 (1978).

Disposition of cases for reasons other than, etc. —

In accord with 1977 Cum. Supp. See In re Nowell, 293 N.C. 235, 237 S.E.2d 246 (1977).

Judge's disposition of traffic cases out of court and without notice to the prosecuting attorney and in his absence constituted willful misconduct in office and conduct prejudicial to the administration of justice that brings the judicial office into disrepute in that he: (1) improperly deprived the district attorney of the opportunity to participate in their disposition; (2) improperly removed the proceedings from the public domain; and (3) violated Canon 3(A)(4) of the North Carolina Code of Judicial Conduct. In re Nowell, 293 N.C. 235, 237 S.E.2d 246 (1977).

Ex parte disposition of a criminal case out of court will amount to conduct prejudicial to the administration of justice. In re Nowell, 293 N.C. 235, 237 S.E.2d 246 (1977).

§ 7A-377. Procedures; employment of executive secretary, special counsel or investigator.

Editor's Note. —

For note on the Judicial Standards Commission, see 54 N.C.L. Rev. 1074 (1976).

Due Process Not Violated by Commission's Functions. — The combination of investigative and judicial functions in the Judicial Standards Commission does not violate a respondent's due process rights under either the federal or North Carolina Constitutions since it is an administrative agency created as an arm of the court, and any alleged partiality of the Commission is cured by the final scrutiny of the Supreme Court. In re Nowell, 293 N.C. 235, 237 S.E.2d 246 (1977).

Article Does Not Vest Absolute Discretion in

Commission. — There is no merit in the contention that this article illegally vests unguided and absolute discretion in the Judicial Standards Commission to choose which complaints to investigate and what evidence it will accept. In re Nowell, 293 N.C. 235, 237 S.E.2d 246 (1977).

Commission's procedures are required to meet constitutional due process standards since a judge's interest in continuing in public office is an individual interest of sufficient importance to warrant constitutional protection against deprivation. In re Nowell, 293 N.C. 235, 237 S.E.2d 246 (1977).

Because of the severe impact which adverse findings by the Judicial Standards Commission and censure or removal by the Supreme Court may reasonably be expected to have upon the individual, fundamental fairness entitles the judge to a hearing which meets the basic requirements of due process. In re Nowell, 293 N.C. 235, 237 S.E.2d 246 (1977).

Section 7A-376 in Pari Materia. — The provisions of this section and § 7A-376 are parts of the same enactment, relate to the same class of persons and are aimed at suppression of the same evil. The statutes are therefore in pari materia and must be construed accordingly. In re Hardy, 294 N.C. 90, 240 S.E.2d 367 (1978).

Nature of Proceeding, etc. —

A proceeding begun before the Judicial Standards Commission is neither a civil nor a criminal action. Such a proceeding is merely an inquiry into the conduct of one exercising judicial power to determine whether he is unfit to hold a judgeship. Its aim is not to punish the individual but to maintain the honor and dignity of the judiciary and the proper administration of justice. In re Nowell, 293 N.C. 235, 237 S.E.2d 246 (1977).

The commission can neither censure nor remove. It functions as an arm of the court to conduct hearings for the purpose of aiding the Supreme Court in determining whether a judge is unfit or unsuitable. In re Hardy, 294 N.C. 90, 240 S.E.2d 367 (1978).

The recommendations of the commission are not binding upon the Supreme Court, which will consider the evidence on both sides and exercise its independent judgment as to whether it should censure, remove, or decline to do either. In re Hardy, 294 N.C. 90, 240 S.E.2d 367 (1978).

Court's Options in Disposing of Commission Recommendation. — When this section and § 7A-376 are read aright they provide that upon recommendation of the Judicial Standards Commission the Supreme Court may censure or remove any justice or judge, may approve or reject the recommendation of the commission, or may remand the matter for further proceedings. In re Hardy, 294 N.C. 90, 240 S.E.2d 367 (1978).

This section and § 7A-376 authorize and empower the Supreme Court, unfettered in its adjudication by the recommendation of the commission, to make the final judgment whether to censure, remove, remand for further proceedings or dismiss the proceeding. In re Hardy, 294 N.C. 90, 240 S.E.2d 367 (1978).

All options listed in this section and § 7A-376 are permissive options available to the Supreme Court in disposing of any disciplinary proceeding. In re Hardy, 294 N.C. 90, 240 S.E.2d 367 (1978).

The Supreme Court is authorized and empowered to order the removal of a judge when the Judicial Standards Commission has only recommended that the judge be censured. In re Hardy, 294 N.C. 90, 240 S.E.2d 367 (1978).

The quantum of proof required in proceedings before the Judicial Standards Commission of this State is proof by clear and convincing evidence — a burden greater than that of proof of a preponderance of the evidence and less than that of proof beyond a reasonable doubt. In re Nowell, 293 N.C. 235, 237 S.E.2d 246 (1977).

The scope of Supreme Court review in a judicial qualifications proceeding should be that of an independent evaluation of the evidence. In re Nowell, 293 N.C. 235, 237 S.E.2d 246 (1977).

SUBCHAPTER IX. REPRESENTATION OF INDIGENT PERSONS.

ARTICLE 36.

Entitlement of Indigent Persons Generally.

§ 7A-450. Indigency; definition; entitlement; determination.

Editor's Note. —

For a note on providing indigent criminal defendants state-paid investigators, see 13 Wake Forest L. Rev. 655 (1977).

Legislative Intent. —

In accord with 1977 Cum. Supp. See State v.

Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977).

Quoted in State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977).

Cited in State v. Sanders, 294 N.C. 337, 240 S.E.2d 788 (1978).

§ 7A-451. Scope of entitlement. — (a) An indigent person is entitled to services of counsel in the following actions and proceedings:

- (1) Any case in which imprisonment, or a fine of five hundred dollars (\$500.00), or more, is likely to be adjudged;
- (2) A hearing on a petition for a writ of habeas corpus under Chapter 17 of the General Statutes;

- (3) A motion for appropriate relief under Chapter 15A of the General Statutes if the defendant has been convicted of a felony, has been fined five hundred dollars (\$500.00) or more, or has been sentenced to a term of imprisonment;
- (4) A hearing for revocation of probation;
- (5) A hearing in which extradition to another state is sought;
- (6) A proceeding for judicial hospitalization under Chapter 122, Article 7 (Judicial Hospitalization) or Article 11 (Mentally Ill Criminals) of the General Statutes and a proceeding for involuntary commitment to a treatment facility under Article 5A of Chapter 122 of the General Statutes;
- (7) In any case of execution against the person under Chapter 1, Article 28 of the General Statutes, and in any civil arrest and bail proceeding under Chapter 1, Article 34, of the General Statutes;
- (8) In the case of a juvenile, a hearing as a result of which commitment to an institution or transfer to the superior court for trial on a felony charge is possible;
- (9) A hearing for revocation of parole at which the right to counsel is provided in accordance with the provisions of Chapter 148, Article 4, of the General Statutes;
- (10) A proceeding for sterilization under Chapter 35, Article 7 (Sterilization of Persons Mentally Ill and Mentally Retarded) of the General Statutes; and
- (11) A proceeding for the provision of protective services according to Chapter 108, Article 4, of the General Statutes;
- (12) In the case of a juvenile alleged to be neglected under Chapter 7A, Article 23 of the General Statutes;
- (13) A proceeding to find a person incompetent under Chapter 35, Article 1A, of the General Statutes.

(b) In each of the actions and proceedings enumerated in subsection (a) of this section, entitlement to the services of counsel begins as soon as feasible after the indigent is taken into custody or service is made upon him of the charge, petition, notice or other initiating process. Entitlement continues through any critical stage of the action or proceeding, including, if applicable:

- (1) An in-custody interrogation;
- (2) A pretrial identification procedure which occurs after formal charges have been preferred and at which the presence of the indigent is required;
- (3) A hearing for the reduction of bail, or to fix bail if bail has been earlier denied;
- (4) A preliminary hearing;
- (5) Trial and sentencing; and
- (6) Review of any judgment or decree pursuant to G.S. 7A-27, 7A-30(1), 7A-30(2), and Subchapter XIV of Chapter 15A of the General Statutes. (1969, c. 1013, s. 1; 1973, c. 151, ss. 1, 2; c. 616; c. 726, s. 4; c. 1116, s. 1; c. 1125; c. 1320; c. 1378, s. 2; 1977, c. 711, ss. 7, 8; c. 725, s. 2.)

Editor's Note. —

Session Laws 1977, c. 711, ss. 7, 8, effective July 1, 1978, rewrote subdivision (3) of subsection (a), which formerly read "A post-conviction proceeding under Chapter 15 of the General Statutes," deleted "if confinement is likely to be adjudged as a result of the hearing" at the end of subdivision (4) of subsection (a), and substituted "Subchapter XIV of Chapter 15A of the General Statutes" for

"G.S. 15-222" at the end of subdivision (6) of subsection (b).

Session Laws 1977, c. 725, s. 2, effective March 1, 1978, added subdivision (13) to subsection (a).

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without

regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

Session Laws 1977, c. 711, s. 36, contains a severability clause.

Because of the postponed effective dates of the 1977 amendments, this section as amended was not set out in the text in the 1977 Cumulative Supplement, but was carried in a note. The amended section is therefore set out in this 1978 Interim Supplement.

Chapter 108, Article 4, referred to in this section, was rewritten by Session Laws 1975, c. 797, and has been recodified as Chapter 108, Article 4A. Chapter 122, Article 7, referred to in this section, was repealed by Session Laws 1977, c. 738, s. 2. See now § 122-58.1 et seq.

For survey of 1972 case law on the right to

counsel for the "undisciplined child," see 51 N.C.L. Rev. 1023 (1973).

For note discussing the right to counsel on discretionary appeal, see 53 N.C.L. Rev. 560 (1974).

Revocation of Suspended Sentence. — Subsection (a) would apply to revocation of a suspended sentence. *State v. Hodges*, 34 N.C. App. 183, 237 S.E.2d 576 (1977).

There was no prejudice to the defendant when he was not appointed counsel prior to a revocation of sentence hearing in district court where upon his appeal of the district court order he was awarded a trial de novo in superior court, and counsel was appointed for him in the superior court in ample time to prepare for his defense. *State v. Hodges*, 34 N.C. App. 183, 237 S.E.2d 576 (1977).

Cited in *State v. Sanders*, 294 N.C. 337, 240 S.E.2d 788 (1978).

§ 7A-452. Source of counsel; fees; compensation of standby counsel.

(d) Unless a public defender or assistant public defender is appointed to serve, the trial judge appointing standby counsel under G.S. 15A-1243 shall award reasonable compensation to be paid by the State. (1969, c. 1013, s. 1; 1971, c. 377, s. 32; 1973, c. 1286, s. 8; 1977, c. 711, s. 9.)

Editor's Note. —

The 1977 amendment, effective July 1, 1978, added subsection (d).

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

Session Laws 1977, c. 711, s. 36, contains a severability clause.

Because of the postponed effective date of the 1977 amendment, subsection (d) as amended was not set out in the text in the 1977 Cumulative Supplement, but was carried in a note. The amended subsection is therefore set out in this 1978 Interim Supplement.

As the rest of the section was not changed by the amendment, only subsection (d) is set out.

§ 7A-454. Supporting services.

Editor's Note. — For a note on providing indigent criminal defendants state-paid investigators, see 13 Wake Forest L. Rev. 655

(1977).

Quoted in *State v. Woods*, 293 N.C. 58, 235 S.E.2d 47 (1977).

§ 7A-455. Partial indigency; liens; acquittals.

State Not to Pay What Defendant Can. — It is not the public policy of this State to subsidize any portion of a defendant's defense which he

himself can pay. *State v. Hardy*, 293 N.C. 105, 235 S.E.2d 828 (1977).

§ 7A-457. Waiver of counsel; pleas of guilty.

Printing Name Rather Than Writing It. — The fact that defendant printed his name instead of signing it to a waiver of rights form was without legal significance and did not warrant

suppression of in-custody statements of defendant. *State v. Roberts*, 293 N.C. 1, 235 S.E.2d 203 (1977).

ARTICLE 37.

The Public Defender.

§ 7A-465. Public defender; defender districts; qualifications; compensation. — The office of public defender is established, effective January 1, 1970, in the following judicial districts: the twelfth and the eighteenth.

The office of public defender is established, effective July 1, 1973, in the twenty-eighth judicial district.

The office of public defender is established, effective July 1, 1975, in the twenty-sixth and twenty-seventh judicial districts. Effective July 1, 1978, the twenty-seventh judicial district is divided into judicial districts 27A and 27B. On that date the current public defender of the twenty-seventh district shall become the public defender for district 27A.

The public defender shall be an attorney licensed to practice law in North Carolina, and shall devote his full time to the duties of his office. (1969, c. 1013, s. 1; 1973, c. 47, s. 2; c. 799, s. 1; 1975, c. 956, s. 14; 1977, c. 802, s. 41.2; c. 1130, s. 6; 1977, 2nd Sess., c. 1219, s. 43.3.)

Editor's Note. —

The 1977, 2nd Sess., amendment, effective July 1, 1978, substituted "July 1, 1978" for "January 1, 1979" near the beginning of the second sentence of the third paragraph.

Session Laws 1977, 2nd Sess., c. 1219, s. 57, contains a severability clause.

Chapter 8.**Evidence.****ARTICLE 1.***Statutes.***§ 8-1. Printed statutes and certified copies evidence.**

Cross Reference. — As to medical malpractice actions, see §§ 90-21.11 through 90-21.14 in the 1977 Cum. Supp., which sections were originally enacted as Article 13 of this Chapter.

§ 8-4. Judicial notice of laws of United States, other states and foreign countries.**Editor's Note.** —

For article, "Recognition of Foreign Judgments," see 50 N.C.L. Rev. 21 (1971).

ARTICLE 4.*Other Writings in Evidence.***§ 8-45. Itemized and verified accounts.**

Editor's Note. — For survey of 1976 case law on evidence, see 55 N.C.L. Rev. 1033 (1977).

ARTICLE 4A.*Photographic Copies of Business and Public Records.***§ 8-45.1. Photographic reproductions admissible; destruction of originals.**

Cited in *Sutton v. Sutton*, 35 N.C. App. 670, 242 S.E.2d 644 (1978).

ARTICLE 7.*Competency of Witnesses.***§ 8-50.1. Competency of evidence of blood tests.****Editor's Note.** —

For note discussing the admissibility of blood-grouping tests to rebut the presumption that a child born during a valid marriage is

legitimate, see 50 N.C.L. Rev. 163 (1971).

For survey of 1974 case law on the use of blood-grouping tests, see 53 N.C.L. Rev. 1057 (1975).

§ 8-51.1. Dying declarations.**Editor's Note.** —

For survey of 1976 case law on evidence, see 55 N.C.L. Rev. 1033 (1977).

Rationale Based on Trustworthiness of Declaration. — The rationale of this section clearly rests upon a belief in the general trustworthiness of dying declarations, rather than upon the necessity for bringing to justice

the perpetrators of secret homicides. *State v. Lester*, 294 N.C. 220, 240 S.E.2d 391 (1978).

Section Expands the Admissibility of Statements. — The overall effect of this section was to liberalize the dying declaration exception to the hearsay rule by expanding the admissibility of such statements to all civil and criminal trials. *State v. Lester*, 294 N.C. 220, 240

S.E.2d 391 (1978).

Declarant's Death Need Not Be in Issue. — Admissibility seems no longer to be confined to situations in which the declarant's death is in issue, but rather extends to any situation in which the cause or circumstances of the declarant's death may be relevant to any issue in litigation. *State v. Lester*, 294 N.C. 220, 240 S.E.2d 391 (1978).

This section results in more restrictive use

of dying declarations in homicide and wrongful death cases, since the court must find, in addition to an apprehension of death with death in fact ensuing, that the deceased believed there was no hope of recovery. *State v. Lester*, 294 N.C. 220, 240 S.E.2d 391 (1978).

It is not necessary for the declarant, etc. —

In accord with 1977 Cum. Supp. See *State v. Lester*, 294 N.C. 220, 240 S.E.2d 391 (1978).

§ 8-53. Communications between physician and patient.

Editor's Note. —

For comment surveying North Carolina law of

relational privilege, see 50 N.C.L. Rev. 630 (1972).

§ 8-53.2. Communications between clergymen and communicants.

Editor's Note. —

For comment surveying North Carolina law of

relational privilege, see 50 N.C.L. Rev. 630 (1972).

§ 8-53.3. Communications between psychologist and client.

Editor's Note. —

For comment surveying North Carolina law of

relational privilege, see 50 N.C.L. Rev. 630 (1972).

§ 8-53.4. School counselor privilege.

Editor's Note. — For comment surveying

North Carolina law of relational privilege, see 50 N.C.L. Rev. 630 (1972).

§ 8-54. Defendant in criminal action competent but not compellable to testify.

Editor's Note. —

For note discussing sua sponte instructions on a defendant's failure to testify, see 54 N.C.L. Rev. 1001 (1976).

The operative portion of 18 U.S.C.A. § 3481 (1948) is almost identical to this section. *State v. Leffingwell*, 34 N.C. App. 205, 237 S.E.2d 550 (1977).

Defendant Treated as Other Witnesses. —

Once a defendant testifies, he assumes the status of any other witness and is subject to impeachment by the questions and arguments of opposing counsel. These arguments may include comments on the witness's failure to explain or deny incriminating evidence since, if an innocent explanation exists or a denial can properly be made, the witness may reasonably be expected to provide it. *State v. Smith*, 294 N.C. 365, 241 S.E.2d 674 (1978).

Proper Instruction. —

The trial court did not err in instructing the

jury regarding defendant's failure to testify even though defendant did not request the instruction. *State v. Hill*, 34 N.C. App. 347, 238 S.E.2d 201 (1977).

While it is better practice to use the words of the statute, i.e., "shall not create any presumption against him," the use of the words "should not" in an instruction concerning defendant's failure to testify is not such error as to require a new trial. *State v. Boone*, 293 N.C. 702, 239 S.E.2d 459 (1977).

A nontestifying defendant has the right, upon proper request, to have the court tell the jury in substance that his failure to take the witness stand and testify in his own behalf does not create any presumption against him. *State v. Leffingwell*, 34 N.C. App. 205, 237 S.E.2d 550 (1977).

Cited in *State v. Thompson*, 293 N.C. 713, 239 S.E.2d 465 (1977); *State v. Alston*, 35 N.C. App. 691, 242 S.E.2d 523 (1978).

§ 8-56. Husband and wife as witnesses in civil action.

Editor's Note. —

For comment surveying North Carolina law of relational privilege, see 50 N.C.L. Rev. 630 (1972).

For survey of 1976 case law on evidence, see 55 N.C.L. Rev. 1033 (1977).

§ 8-57. Husband and wife as witnesses in criminal actions.

Editor's Note. —

For comment surveying North Carolina law of relational privilege, see 50 N.C.L. Rev. 630 (1972).

For survey of 1976 case law on evidence, see 55 N.C.L. Rev. 1033 (1977).

Applied in *State v. Ward*, 34 N.C. App. 598, 239 S.E.2d 291 (1977).

Cited in *State v. Thompson*, 293 N.C. 713, 239 S.E.2d 465 (1977).

§ 8-57.1. Husband-wife privilege waived in child abuse.

Editor's Note. —

For comment surveying North Carolina law of

relational privilege, see 50 N.C.L. Rev. 630 (1972).

ARTICLE 10.

Depositions.

§ 8-74. Depositions for defendant in criminal actions.

Editor's Note. —

For article discussing the constitutional considerations with respect to criminal discovery

for the defense and prosecution, see 50 N.C.L. Rev. 437 (1972).

§ 8-81. Objection to deposition before trial.

Cited in *State v. Montgomery*, 33 N.C. App. 693, 236 S.E.2d 390 (1977).

Chapter 9.

Jurors.

Article 1.

Jury Commissions, Preparation of Jury Lists, and Drawing of Panels.

Sec.

9-3. Qualifications of prospective jurors.

Article 2.

Petit Jurors.

9-15. Questioning jurors without challenge; challenges for cause.

Sec.

9-17. Jurors impaneled to try case furnished with accommodations; separation of jurors.

9-18. Alternate jurors.

Article 3.

Peremptory Challenges.

9-21. Peremptory challenges in criminal cases governed by Chapter 15A.

ARTICLE 1.

Jury Commissions, Preparation of Jury Lists, and Drawing of Panels.

§ 9-1. Jury commission in each county; membership; selection; oath; terms.

Stated in *State v. Harbison*, 293 N.C. 474, 238 S.E.2d 449 (1977).

§ 9-2. Preparation of jury list; sources of names.

The plan in this section, etc. —

In accord with 1977 Cum. Supp. See *State v. Hardy*, 293 N.C. 105, 235 S.E.2d 828 (1977).

Requiring Defense Counsel to Investigate Jury Selection Procedures. — It places no undue burden on defense counsel to require them to make investigations into jury composition and selection procedures with regard to possible systematic racial exclusion prior to the time of trial, so long as the time between retention or appointment of counsel, the date the jury panel is drawn, and the date of trial is not so brief as to make such investigation impractical. *State v. Harbison*, 293 N.C. 474, 238 S.E.2d 449 (1977).

Reasonable Time Allowed Defendant to Investigate Improper Procedures. — A defendant must be allowed a reasonable time

and opportunity to inquire into and present evidence regarding the alleged systematic exclusion of Negroes because of their race from serving on the grand or petit jury in his case. Whether he was afforded a reasonable time and opportunity must be determined from the facts in each particular case. *State v. Harbison*, 293 N.C. 474, 238 S.E.2d 449 (1977).

Compliance with Section. — There was no systematic exclusion of blacks, women and 18 through 21-year-olds where jury commissions used a neutral systematic selection procedure (e.g., every 6th name) in selecting names from the source lists as required by this section, and it appears that the only criteria used in striking names from the jury lists were the permissible disqualifications set out in § 9-3. *State v. Hardy*, 293 N.C. 105, 235 S.E.2d 828 (1977).

§ 9-3. Qualifications of prospective jurors. — All persons are qualified to serve as jurors and to be included on the jury list who are citizens of the State and residents of the county, who have not served as jurors during the preceding two years, who are 18 years of age or over, who are physically and mentally competent, who can hear and understand the English language, who have not been convicted of a felony or pleaded guilty or nolo contendere to an indictment charging a felony (or if convicted of a felony or having pleaded guilty or nolo contendere to an indictment charging a felony have had their citizenship restored pursuant to law), and who have not been adjudged non compos mentis. Persons not qualified under this section are subject to challenge for cause. (1806, c. 694,

P. R.; Code, ss. 1722, 1723; 1889, c. 559; 1897, cc. 117, 539; 1899, c. 729; Rev., s. 1957; C. S., s. 2312; 1947, c. 1007, s. 1; 1967, c. 218, s. 1; 1971, c. 1231, s. 1; 1973, c. 230, ss. 1, 2; 1977, c. 711, s. 10.)

Editor's Note. —

The 1977 amendment, effective July 1, 1978, inserted "who can hear and understand the English language" near the middle of the first sentence.

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

Session Laws 1977, c. 711, s. 36, contains a severability clause.

Because of the postponed effective date of the 1977 amendment, this section as amended was not set out in the text in the 1977 Cumulative

Supplement, but was carried in a note. The amended section is therefore set out in this 1978 Interim Supplement.

Mere Summons Does Not Disqualify Person for Two Years. — It is actual service as a juror rather than a mere summons for jury duty which disqualifies him for service for the next two years. *State v. Berry*, 35 N.C. App. 128, 240 S.E.2d 633 (1978).

Compliance with Section. — There was no systematic exclusion of blacks, women and 18 through 21-year-olds where jury commissions used a neutral systematic selection procedure (e.g., every 6th name) in selecting names from the source lists as required by § 9-2, and it appears that the only criteria used in striking names from the jury lists were the permissible disqualifications set out in this section. *State v. Hardy*, 293 N.C. 105, 235 S.E.2d 828 (1977).

§ 9-4. Preparation and custody of list.

Requiring Defense Counsel to Investigate Jury Selection Procedures. — It places no undue burden on defense counsel to require them to make investigations into jury composition and selection procedures with regard to possible systematic racial exclusion prior to the time of trial, so long as the time between retention or appointment of counsel, the date the jury panel is drawn, and the date of trial is not so brief as to make such investigation impractical. *State v. Harbison*, 293 N.C. 474, 238 S.E.2d 449 (1977).

Reasonable Time Allowed Defendant to Investigate Improper Procedures. — A defendant must be allowed a reasonable time and opportunity to inquire into and present evidence regarding the alleged systematic exclusion of Negroes because of their race from serving on the grand or petit jury in his case. Whether he was afforded a reasonable time and opportunity must be determined from the facts in each particular case. *State v. Harbison*, 293 N.C. 474, 238 S.E.2d 449 (1977).

§ 9-6. Jury service a public duty; excuses to be allowed in exceptional cases; procedure.

Stated in *State v. Harbison*, 293 N.C. 474, 238 S.E.2d 449 (1977).

ARTICLE 2.

Petit Jurors.

§ 9-15. Questioning jurors without challenge; challenges for cause.

(c) In civil cases if any juror has a suit pending and at issue in the court in which he is serving, he may be challenged for cause, and he shall be withdrawn from the trial panel, and may be withdrawn from the venire in the discretion of the presiding judge. In criminal cases challenges are governed by Article 72, *Selecting and Impaneling the Jury*, of Chapter 15A of the General Statutes. (1806, c. 694, P. R.; 1868-9, c. 9, s. 7; Code, s. 1728; Rev., s. 1960; 1913, c. 31, ss. 5, 6, 7; C. S., ss. 2316, 2325, 2326; 1933, c. 130; 1967, c. 218, s. 1; 1973, c. 95; 1977, c. 711, s. 11.)

Editor's Note. —

The 1977 amendment, effective July 1, 1978, added "In civil cases" at the beginning of the first sentence of subsection (c) and added the second sentence of subsection (c).

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

Session Laws 1977, c. 711, s. 36, contains a severability clause.

Because of the postponed effective date of the 1977 amendment, subsection (c) as amended was not set out in the text in the 1977 Cumulative Supplement, but was carried in a note. The amended subsection is therefore set out in this 1978 Interim Supplement.

As the rest of the section was not changed by the amendment, it is not set out.

Purpose of Voir Dire. —

In accord with 2nd paragraph in 1977 Cum. Supp. See *In re Will of Worrell*, 35 N.C. App. 278, 241 S.E.2d 343 (1978).

In accord with 5th paragraph in 1977 Cum. Supp. See *In re Will of Worrell*, 35 N.C. App. 278, 241 S.E.2d 343 (1978).

Regulation of Voir Dire, etc. —

The manner and extent of the inquiry of prospective jurors is a matter committed largely to the discretion of the trial judge and is subject to his close supervision. *State v. Denny*, 294 N.C. 294, 240 S.E.2d 437 (1978).

Any party to an action, etc. —

In accord with 3rd paragraph in 1977 Cum. Supp. See *State v. Thomas*, 294 N.C. 105, 240 S.E.2d 426 (1978).

Judge's Discretion Subject to Review. —

While the regulation of the manner and extent of the inquiry on voir dire rests largely in the trial judge's discretion, his exercise of discretion is not absolute and is subject to review on appeal. *In re Will of Worrell*, 35 N.C. App. 278, 241 S.E.2d 343 (1978).

Prohibiting Ambiguous or Confusing Questions. — Discretion over the inquiry on voir dire is properly exercised when the trial court prohibits ambiguous or confusing hypothetical questions. *State v. Denny*, 294 N.C. 294, 240 S.E.2d 437 (1978).

On the voir dire examination of prospective jurors, hypothetical questions so phrased as to be ambiguous and confusing or containing incorrect or inadequate statements of the law are improper and should not be allowed. *State v. Denny*, 294 N.C. 294, 240 S.E.2d 437 (1978).

A motion to examine jurors individually, rather than collectively, is directed to the sound discretion which the trial court possesses for regulating the jury selection process. *State v. Thomas*, 294 N.C. 105, 240 S.E.2d 426 (1978).

Subsection (c) subjects a litigant rather than a witness to disqualification as a juror when he has a suit pending and at issue in the court in which he is called to serve as a juror. *State v. Williams*, 293 N.C. 102, 235 S.E.2d 248 (1977).

Subsection (c) is designed to protect the prospective juror's adversary in his pending case rather than to protect parties to cases in which he might serve as a juror. *State v. Williams*, 293 N.C. 102, 235 S.E.2d 248 (1977).

Questions Regarding Right to Make a Will. —

In view of the possibility that many people, for one reason or another, do not agree with the statutory right of a person to make a will, propounders of a will should be allowed to question prospective jurors with respect to their feelings on that question. *In re Will of Worrell*, 35 N.C. App. 278, 241 S.E.2d 343 (1978).

§ 9-17. Jurors impaneled to try case furnished with accommodations; separation of jurors. — A jury, impaneled to try any cause, shall be put in charge of an officer of the court and shall be furnished with such accommodations as the court may order, and the accommodations shall be paid for by the parties or by the State, as ordered by the presiding judge. When sequestration of the jury is ordered in a criminal case, however, the State shall pay for all accommodations of jurors.

The presiding judge, in his discretion, may direct any jury to be sequestered while it has a case or issue under consideration. (1876-7, c. 173; Code, s. 1736; 1889, c. 44; Rev., s. 1978; C. S., s. 2327; 1947, c. 1007, s. 2; 1967, c. 218, s. 1; 1977, c. 711, s. 12.)

Editor's Note. — The 1977 amendment, effective July 1, 1978, added the second sentence of the first paragraph.

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall

become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

Session Laws 1977, c. 711, s. 36, contains a

severability clause.

Because of the postponed effective date of the 1977 amendment, this section as amended was not set out in the text in the 1977 Cumulative Supplement, but was carried in a note. The amended section is therefore set out in this 1978 Interim Supplement.

§ 9-18. Alternate jurors. — (a) Civil Cases. — Whenever the presiding judge deems it appropriate, one or more alternate jurors may be selected in the same manner as the regular trial panel of jurors in the case, but after the regular jury has been duly impaneled. Each party shall be entitled to two peremptory challenges as to each such alternate juror, in addition to any unexpended challenges the party may have left after the selection of the regular trial panel. Alternate jurors shall be sworn and seated near the jury with equal opportunity to see and hear the proceedings and shall attend the trial at all times with the jury and shall obey all orders and admonitions of the court to the jury. When the jurors are ordered kept together in any case, the alternate jurors shall be kept with them. An alternate juror shall receive the same compensation as other jurors and, except as hereinafter provided, shall be discharged upon the final submission of the case to the jury. If before that time any juror dies, becomes incapacitated or disqualified, or is discharged for any reason, an alternate juror shall become a part of the jury and serve in all respects as those selected on the regular trial panel. If more than one alternate juror has been selected, they shall be available to become a part of the jury in the order in which they were selected.

(b) Criminal Cases. — Procedures relating to alternate jurors in criminal cases are governed by Article 72, Selecting and Impaneling the Jury, of Chapter 15A of the General Statutes. (1981, c. 103; 1939, c. 35; 1951, cc. 82, 1043; 1967, c. 218, s. 1; 1977, c. 406, ss. 3-5; c. 711, s. 13.)

Editor's Note. —

The second 1977 amendment, effective July 1, 1978, designated the former provisions of this section as subsection (a), added the subcatchline "Civil Cases" at the beginning of subsection (a) and added subsection (b).

Because of the inconsistency between the provisions of the first 1977 amendment, Session Laws 1977, c. 406, ss. 3-5, effective June 1, 1977, and the second 1977 amendment, Session Laws 1977, c. 711, s. 13, effective July 1, 1978, the changes made by the first amendment have not been incorporated in subsection (a) of the section as set out above.

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall

become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

Session Laws 1977, c. 711, s. 36, contains a severability clause.

Because of the postponed effective date of the second 1977 amendment, this section as amended by ch. 711 was not set out in the text in the 1977 Cumulative Supplement, but was carried in a note. The section amended by ch. 711 is therefore set out in this 1978 Interim Supplement.

ARTICLE 3.

Peremptory Challenges.

§ 9-21. Peremptory challenges in criminal cases governed by Chapter 15A. — Peremptory challenges in criminal cases are governed by Article 72, Selecting and Impaneling the Jury, of Chapter 15A of the General Statutes. (22 Hen. VIII, c. 14, s. 6; 33 Edw. I, c. 4; 1777, c. 115, s. 85, P. R.; 1801, c. 592, s. 1, P. R.; 1812, c. 833, P. R.; 1826, c. 9; 1827, c. 10; R. S., c. 35, ss. 19, 21; R. C., c. 35, ss. 32,

33; 1871-2, c. 39; Code, ss. 1199, 1200; 1887, c. 53; Rev. ss. 3263, 3264; 1907, c. 415; 1913, c. 31, ss. 3, 4; C. S., ss. 4633, 4634; 1935, c. 475, ss. 2, 3; 1967, c. 218, s. 1; 1969, c. 205, s. 7; 1971, c. 75; 1977, c. 711, s. 14.)

Editor's Note. —
The 1977 amendment, effective July 1, 1978, rewrote this section, which formerly provided for the number of peremptory challenges in capital and other criminal cases.
Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered

against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."
Session Laws 1977, c. 711, s. 36, contains a severability clause.

Because of the postponed effective date of the 1977 amendment, this section as amended was not set out in the text in the 1977 Cumulative Supplement, but was carried in a note. The amended section is therefore set out in this 1978 Interim Supplement.

CHAPTER VI. CRIMINAL LAW.
SUBCHAPTER VI. CRIMINAL LAW, (CONT'D.)
Article 22.
Treason to Land and Fisheries.
16-22 Perpetration of offenses and attempts to perpetrate.
SUBCHAPTER VII. OFFENSES AGAINST PUBLIC JUSTICE.
Article 23.
Obstructing Justice.
16-23 Intimidating or interfering with witnesses.

SUBCHAPTER I. GENERAL PROVISIONS.

ARTICLE 1.

Felony and Misdemeanor.

§ 14-2. Punishment of felonies: what constitutes life sentence. — Every person who shall be convicted of any felony for which no specific punishment is prescribed by statute shall be punished by fine, by imprisonment for a term not exceeding 10 years, or by both, as the discretion of the court. (R. C., c. 34, s. 27; Code, s. 1896; Rev. s. 3262, c. 3, s. 472; 1967, c. 1251, s. 2; 1975, c. 1361, s. 5; 1977, c. 711, s. 15.)

Editor's Note. —
The 1977 amendment, effective July 1, 1978, deleted the former second sentence, which read: "A sentence of life imprisonment shall be considered as a sentence of imprisonment for a term of 30 years in the State prison."
Session Laws 1977, c. 711, s. 35, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered

against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."
Session Laws 1977, c. 711, s. 36, contains a severability clause.
Because of the postponed effective date of the 1977 amendment, this section as amended was not set out in the text in the 1977 Cumulative Supplement, but was carried in a note. The amended section is, therefore, set out in this 1978 Interim Supplement.
Cited in The State v. Gardner, 1978 Supp. 255 (W.D.N.C. 1978).

Chapter 13.

Citizenship Restored.

§ 13-1. Restoration of citizenship.

Editor's Note. —

For a note on the constitutionality of denying

voting rights to convicted criminals, see 50 N.C.L. Rev. 903 (1972).

§ 13-2. Issuance and filing of certificate or order of restoration.

Editor's Note. —

For a note on the constitutionality of denying

voting rights to convicted criminals, see 50 N.C.L. Rev. 903 (1972).

§ 13-3. Issuance, service and filing of warrant of unconditional pardon.

Editor's Note. — For a note on the constitutionality of denying voting rights to

convicted criminals, see 50 N.C.L. Rev. 903 (1972).

(b) *Criminal Cases. —* Procedures relating to alternate jurors in criminal cases are governed by Article 72, Selecting and Impaneling the Jury, of Chapter 15A of the General Statutes (1941, c. 104; 1939, c. 33; 1931, c. 22, 1929; 1907, c. 218, s. 1; 1977, c. 408, ss. 2-6; c. 711, s. 18.)

Editor's Note. —

The second 1977 amendment effective July 1, 1978, designated the former provisions of this section as subsection (a) with the subheadline "Civil Cases" at the beginning of subsection (a) and added subsection (b).

Because of the inconsistency between the provisions of the first 1977 amendment, Session Laws 1977, c. 408, ss. 2-6, effective June 1, 1977, and the second 1977 amendment, Session Laws 1977, c. 711, s. 18, effective July 1, 1978, the changes made by the first amendment have not been incorporated in subsection (a) of the section as set out above.

Session Laws 1977, c. 711, s. 28, as amended by Session Laws 1977, 1978, c. 1147, s. 28, effective July 1, 1978, providing: "This act shall

become effective July 1, 1978, and apply to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provision of this act regarding perjury shall not apply to persons sentenced before July 1, 1978."

Session Laws 1977, c. 711, s. 28, contains a severability clause.

Because of the proposed effective date of the second 1977 amendment, this section as amended by ch. 711 was not set out in the text of the 1977 Cumulative Supplement, but was carried in a note. The section amended by ch. 711 is therefore set out in this 1978 Update Supplement.

ARTICLE 3.

Peremptory Challenges.

§ 3-21. Peremptory challenges in criminal cases governed by Chapter 15A. — Peremptory challenges in criminal cases are governed by Article 72, Selecting and Impaneling the Jury, of Chapter 15A of the General Statutes. (22 Hen. VIII, c. 14, s. 6; 32 Hen. I, c. 4; 1774, c. 118, s. 25, P. R.; 1801, c. 892, s. 1, P. R.; 1812, c. 233, P. R.; 1825, c. 9; 1827, c. 10; R. S., c. 26, ss. 19, 21; R. C., c. 36, ss. 32.

Chapter 14. Criminal Law.

SUBCHAPTER I. GENERAL PROVISIONS.

Article 1.

Felonies and Misdemeanors.

Sec.

14-2. Punishment of felonies; what constitutes life sentence.

SUBCHAPTER V. OFFENSES AGAINST PROPERTY.

Article 20.

Frauds.

14-118.5. Theft of cable television service.

SUBCHAPTER VI. CRIMINAL TRESPASS.

Article 22.

Trespasses to Land and Fixtures.

14-155. Unauthorized connections with telephone or telegraph.

SUBCHAPTER VIII. OFFENSES AGAINST PUBLIC JUSTICE.

Article 30.

Obstructing Justice.

14-226. Intimidating or interfering with witnesses.

SUBCHAPTER XI. GENERAL POLICE REGULATIONS.

Article 42.

Public Drunkenness.

Sec.

14-334 to 14-335.1. [Repealed.]

14-438 to 14-442. [Reserved.]

Article 59.

Public Intoxication.

14-443. Definitions.

14-444. Intoxicated and disruptive in public.

14-445. Defense of alcoholism.

14-446. Disposition of defendant acquitted because of alcoholism.

14-447. No prosecution for public intoxication.

SUBCHAPTER I. GENERAL PROVISIONS.

ARTICLE 1.

Felonies and Misdemeanors.

§ 14-2. Punishment of felonies; what constitutes life sentence. — Every person who shall be convicted of any felony for which no specific punishment is prescribed by statute shall be punished by fine, by imprisonment for a term not exceeding 10 years, or by both, in the discretion of the court. (R. C., c. 34, s. 27; Code, s. 1096; Rev., s. 3292; C. S., s. 4172; 1967, c. 1251, s. 2; 1973, c. 1201, s. 6; 1977, c. 711, s. 15.)

Editor's Note. —

The 1977 amendment, effective July 1, 1978, deleted the former second sentence, which read: "A sentence of life imprisonment shall be considered as a sentence of imprisonment for a term of 80 years in the State's prison."

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered

against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

Session Laws 1977, c. 711, s. 36, contains a severability clause.

Because of the postponed effective date of the 1977 amendment, this section as amended was not set out in the text in the 1977 Cumulative Supplement, but was carried in a note. The amended section is therefore set out in this 1978 Interim Supplement.

Cited in Thacker v. Garrison, 445 F. Supp. 376 (W.D.N.C. 1978).

§ 14-3. Punishment of misdemeanors, infamous offenses, offenses committed in secrecy and malice or with deceit and intent to defraud.

Cited in *Wheaton v. Hagan*, 435 F. Supp. 1134 (M.D.N.C. 1977); *Thacker v. Garrison*, 445 F. Supp. 376 (W.D.N.C. 1978).

§ 14-4. Violation of local ordinances misdemeanor.

Cited in *Wheaton v. Hagan*, 435 F. Supp. 1134 (M.D.N.C. 1977).

ARTICLE 2.

Principals and Accessories.

§ 14-5. Accessories before the fact; trial and punishment.

Who Is Accessory before the Fact. —

An accessory before the fact is one who procures, counsels, commands or encourages the principal to commit it. *State v. Furr*, 292 N.C. 711, 235 S.E.2d 193 (1977).

In this State, one who procures another to commit murder is an accessory before the fact to murder. *State v. Furr*, 292 N.C. 711, 235 S.E.2d 193 (1977).

Who Are Principals. —

A principal is one who is present at and participates in the crime charged or who procures an innocent agent to commit the crime.

State v. Furr, 292 N.C. 711, 235 S.E.2d 193 (1977).

Conspiracy and Being Accessory Distinguished. — The offense of conspiracy and the offense of being an accessory before the fact are separate, distinct crimes, which do not merge into each other and neither of which is a lesser included offense of the other. A person may, therefore, be lawfully convicted of and punished for both a conspiracy to commit a murder and being an accessory before the fact to the same murder. *State v. Looney*, 294 N.C. 1, 240 S.E.2d 612 (1978).

§ 14-7. Accessories after the fact; trial and punishment.

Cited in *State v. Carrington*, 35 N.C. App. 53, 240 S.E.2d 475 (1978).

SUBCHAPTER III. OFFENSES AGAINST THE PERSON.

ARTICLE 6.

Homicide.

§ 14-17. Murder in the first and second degree defined; punishment.

I. IN GENERAL.

Editor's Note. —

For survey of 1976 case law on constitutional law, see 55 N.C.L. Rev. 965 (1977).

For a comment on the merger doctrine as a limitation on the felony-murder rule, see 13 Wake Forest L. Rev. 369 (1977).

State Has Burden to Show Jurisdiction. —

In a prosecution for murder, the defendant's challenge to jurisdiction alleging the insufficiency of the evidence to show the murder was committed in this state is not an affirmative defense. Rather the State has the burden to show beyond a reasonable doubt that the courts of this State had jurisdiction to try the accused. Former cases to the contrary are no longer authoritative. *State v. Batdorf*, 293 N.C. 486, 238 S.E.2d 497 (1977).

Distinction between Principals and Accessories Maintained. —

The North Carolina law of homicide still maintains a careful distinction between principals and accessories. *State v. Furr*, 292 N.C. 711, 235 S.E.2d 193 (1977).

Voluntary drunkenness, etc. —

Voluntary drunkenness is a defense to the charge of first-degree murder to the extent that it precludes the mental processes of premeditation and deliberation. *State v. Couch*, 35 N.C. App. 202, 241 S.E.2d 105 (1978).

Voluntary drunkenness is no defense to murder in the second degree. *State v. Couch*, 35 N.C. App. 202, 241 S.E.2d 105 (1978).

Self-Defense. —

For discussion of State's burden to establish

all elements of a criminal offense beyond a reasonable doubt and of retroactivity of rule in *Mullaney v. Wilbur*, 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975), see *Hankerson v. North Carolina*, U.S. , 97 S. Ct. 2339, L. Ed. 2d (1977).

Applied in State v. Carter, 293 N.C. 532, 238 S.E.2d 493 (1977).

Cited in State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977); *State v. Finch*, 293 N.C. 132, 235 S.E.2d 819 (1977); *State v. Kirkman*, 293 N.C. 447, 238 S.E.2d 456 (1977); *State v. Harbison*, 293 N.C. 474, 238 S.E.2d 449 (1977); *State v. Hood*, 294 N.C. 30, 239 S.E.2d 802 (1978); *State v. Walters*, 294 N.C. 311, 240 S.E.2d 628 (1978); *State v. Walters*, 33 N.C. App. 521, 235 S.E.2d 906 (1977).

II. MURDER IN GENERAL.

Malice—Definition. —

In accord with 2nd paragraph in original. See *State v. Cates*, 293 N.C. 462, 238 S.E.2d 465 (1977).

Accessory Defined. — In this State, one who procures another to commit murder is an accessory before the fact to murder. *State v. Furr*, 292 N.C. 711, 235 S.E.2d 193 (1977).

Motive — Insufficient to Convict. — Evidence of motive, standing alone, is insufficient to support a conviction for murder. *State v. Lee*, 34 N.C. App. 106, 237 S.E.2d 315 (1977).

Term “Felony Murder” Disapproved. — Since “felony murder” is not a statutory term, its use in an issue submitted to the jury is ill-advised and its usage is expressly disapproved. *State v. Foster*, 293 N.C. 674, 239 S.E.2d 449 (1977).

III. MURDER IN THE FIRST DEGREE.

Definition. —

In accord with 1st paragraph in original. See *State v. Cates*, 293 N.C. 462, 238 S.E.2d 465 (1977); *State v. Thomas*, 294 N.C. 105, 240 S.E.2d 426 (1978); *State v. Hill*, 294 N.C. 320, 240 S.E.2d 794 (1978).

Deliberation and Premeditation. —

Ordinarily, premeditation and deliberation are not susceptible of proof by direct evidence, and therefore must usually be proved by circumstantial evidence. Among the circumstances to be considered in determining whether a killing is done with premeditation and deliberation are: (1) the want of provocation on the part of deceased; (2) the conduct of defendant before and after the killing; (3) the vicious and brutal manner of the killing; and (4) the number of blows inflicted. *State v. Hill*, 294 N.C. 320, 240 S.E.2d 794 (1978).

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conduct of defendant before and after the killing; (3) the vicious and brutal manner of the killing; and (4) the number of blows inflicted or shots fired. *State v. Cates*, 293 N.C. 462, 238 S.E.2d 465 (1977).

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Same—Premeditation. —

In accord with original. See *State v. Baggett*, 293 N.C. 307, 237 S.E.2d 827 (1977).

In accord with 3rd paragraph in 1977 Cum. Supp. See *State v. Cates*, 293 N.C. 462, 238 S.E.2d 465 (1977); *State v. Thomas*, 294 N.C. 105, 240 S.E.2d 426 (1978); *State v. Hill*, 294 N.C. 320, 240 S.E.2d 794 (1978).

Same—Deliberation. —

In accord with 3rd paragraph in 1977 Cum. Supp. See *State v. Cates*, 293 N.C. 462, 238 S.E.2d 465 (1977); *State v. Thomas*, 294 N.C. 105, 240 S.E.2d 426 (1978); *State v. Hill*, 294 N.C. 320, 240 S.E.2d 794 (1978).

Same—Inferred from Circumstances. —

In accord with 10th paragraph in 1977 Cum. Supp. See *State v. Cates*, 293 N.C. 462, 238 S.E.2d 465 (1977).

What Felonies Are within Purview of Section. —

In accord with 3rd paragraph in 1977 Cum. Supp. See *State v. Foster*, 293 N.C. 674, 239 S.E.2d 449 (1977).

IV. MURDER IN THE SECOND DEGREE.

Definition. —

In accord with 3rd paragraph in 1977 Cum. Supp. See *State v. Cates*, 293 N.C. 462, 238 S.E.2d 465 (1977).

Burden of Proof. —

On review of a conviction for second degree murder the Supreme Court of North Carolina erred in declining to hold retroactive the rule in *Mullaney v. Wilbur*, 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975), which requires the State to establish all elements of a criminal offense beyond a reasonable doubt, and which invalidates presumptions that shift the burden of proving such elements, including self-defense, to the defendant. *Hankerson v. North Carolina*, U.S. , 97 S. Ct. 2339, L. Ed. 2d (1977).

Intent Rarely Proved by Direct Evidence. —

Intent, a necessary element of murder in the second degree, is a mental attitude which can

rarely be proved by direct evidence. It must ordinarily be proved by circumstances from which it can be inferred. *State v. Hugenberg*, 34 N.C. App. 91, 237 S.E.2d 327, cert. denied, 293 N.C. 591 (1977).

V. PLEADING AND PRACTICE

What State Must Prove Generally. —

As in all criminal cases, in a prosecution for homicide during the perpetration or attempted perpetration of a robbery, there are two items which the State must prove: (a) that a crime has been committed, i.e., the corpus delicti; and (b) that defendant committed the crime. *State v. Perry*, 293 N.C. 97, 235 S.E.2d 52 (1977).

In accord with 1st paragraph in 1977 Cum. Supp. *State v. Furr*, 292 N.C. 711, 235 S.E.2d 193 (1977).

Evidence of Killing in Perpetration of Robbery. —

Evidence of the defendant's participation in a prior armed robbery is admissible for the purpose of showing intent in a prosecution for murder committed during the perpetration or attempted perpetration of a robbery. *State v. May*, 292 N.C. 644, 235 S.E.2d 178, 293 N.C. 261 (1977).

Evidence Insufficient to Convict. —

Where the evidence showed that defendant wanted his wife dead, that he actively sought her death, and that he harbored great hostility toward her; this, without more, was not enough to permit a jury to find that he killed her. *State v. Furr*, 292 N.C. 711, 235 S.E.2d 193 (1977).

Where the evidence might support a reasonable inference that defendant was responsible for his wife's death and that he procured someone to murder her, these facts alone would not make defendant guilty of murder. *State v. Furr*, 292 N.C. 711, 235 S.E.2d 193 (1977).

Evidence Insufficient to Support Defense of Accidental Death. — Evidence in a prosecution for second-degree murder that defendant did not intend for the bullet to strike the victim but that he intended to fire to the right of his head for

the purpose of scaring him did not present the defense of death by accident. *State v. Walker*, 34 N.C. App. 485, 238 S.E.2d 666 (1977).

Instructions. —

Instructions placing the burden on defendant (1) to show circumstances that would reduce the offense from second-degree murder to manslaughter and (2) to justify the killing on ground of self-defense were erroneous in view of *Mullaney v. Wilbur*, 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975), and *State v. Hankerson*, 288 N.C. 632, 220 S.E.2d 575 (1975). *State v. McLaurin*, 33 N.C. App. 589, 235 S.E.2d 871 (1977).

Instruction on Insanity Properly Refused.

— In the absence of any evidence of insanity, it is not error for the trial judge to refuse the defendant's request that he instruct the jury upon the law relating to insanity as a defense to the charge of murder. *State v. Jones*, 293 N.C. 413, 238 S.E.2d 482 (1977).

When Jury Must Be Instructed as to Lesser Degree of Homicide. — In all cases in which the State relies upon premeditation and deliberation to support a first-degree murder conviction, the court must submit the issue of second-degree murder. *State v. Hammond*, 34 N.C. App. 390, 238 S.E.2d 198 (1977).

In order for the trial court to submit a charge of first-degree murder to the jury, there must be evidence tending to show that the defendant, with malice, after premeditation and deliberation, intentionally shot and killed the victim. *State v. Baggett*, 293 N.C. 307, 237 S.E.2d 827 (1977).

Where Jury May Be Instructed to Return, etc. — Where no inference can fairly be deduced from the evidence of or tending to prove a murder in the second degree or manslaughter, the trial judge should instruct the jury that it is their duty to render a verdict of "guilty of murder in the first degree," if they are satisfied beyond a reasonable doubt, or of "not guilty." *State v. Smith*, 294 N.C. 365, 241 S.E.2d 674 (1978).

§ 14-18. Punishment for manslaughter.

Definitions. —

In accord with 4th paragraph in 1977 Cum. Supp. See *State v. Cates*, 293 N.C. 462, 238 S.E.2d 465 (1977).

In accord with 8th paragraph in 1977 Cum.

Supp. See *State v. Cates*, 293 N.C. 462, 238 S.E.2d 465 (1977).

Cited in *State v. Walters*, 33 N.C. App. 521, 235 S.E.2d 906 (1977), 294 N.C. 311, 240 S.E.2d 628 (1978).

ARTICLE 7.

*Rape and Kindred Offenses.***§ 14-21. Rape; punishment in the first and second degree.**

Session Laws 1973, c. 1201, s. 7, Authorizes Substitute Sentence. — The judgment in a prosecution for first-degree rape which imposed a sentence of death upon a defendant was vacated and a sentence of life imprisonment substituted in lieu thereof under authority of Session Laws 1973, c. 1201, s. 7. *State v. Roberts*, 293 N.C. 1, 235 S.E.2d 203 (1977).

Rape Defined. —

In accord with 3rd paragraph in original. See *State v. Hall*, 293 N.C. 559, 238 S.E.2d 473 (1977).

The element of "by force and against her will" has long been present in North Carolina rape statutes, and is still sufficient to support a conviction of second-degree rape under this section. *State v. Roberts*, 293 N.C. 1, 235 S.E.2d 203 (1977).

"Resistance Overcome." — Subdivision (1)(b) does not mean that the victim's resistance must completely cease in order to be "overcome" by infliction of serious bodily injury. *State v. Roberts*, 293 N.C. 1, 235 S.E.2d 203 (1977).

"Serious Bodily Injury." — Some guidance to the meaning of the phrase "serious bodily injury" can be found by reference to cases construing § 14-32 (assault with a deadly weapon with intent to kill inflicting serious injury) and by viewing similar cases from other jurisdictions. *State v. Roberts*, 293 N.C. 1, 235 S.E.2d 203 (1977).

"Serious bodily injury" is not the equivalent of "by force and against her will." *State v. Roberts*, 293 N.C. 1, 235 S.E.2d 203 (1977).

Evidence of physical resistance is not necessary to prove lack of consent in a rape case. *State v. Hall*, 293 N.C. 559, 238 S.E.2d 473 (1977).

The elements of rape in the first degree, etc. —

In accord with 1977 Cum. Supp. See *State v. Goss*, 293 N.C. 147, 235 S.E.2d 844 (1977).

A conviction of first-degree rape requires not only a carnal knowledge of a female "by force and against her will" but also the use of a deadly weapon or the infliction of "serious bodily injury" which overcomes the victim's resistance or procures her submission. *State v. Roberts*, 293 N.C. 1, 235 S.E.2d 203 (1977).

Subdivision (1)(b) means that the assailant is guilty of first-degree rape if the rape is accomplished by force and against her will after the victim's resistance is rendered ineffectual by the infliction of serious bodily injury. *State v. Roberts*, 293 N.C. 1, 235 S.E.2d 203 (1977).

"By Force." —

The mere threat of serious bodily harm which reasonably induces fear thereof constitutes the requisite force. *State v. Roberts*, 293 N.C. 1, 235

S.E.2d 203 (1977).

The force necessary to meet the requirement need not be physical force but may take the form of fear, fright or coercion. *State v. Roberts*, 293 N.C. 1, 235 S.E.2d 203 (1977).

In accord with 4th paragraph in original. See *State v. Hall*, 293 N.C. 559, 238 S.E.2d 473 (1977).

In accord with 3rd paragraph in 1977 Cum. Supp. See *State v. Hall*, 293 N.C. 559, 238 S.E.2d 473 (1977).

Consent Induced by Fear, etc. —

In accord with 2nd paragraph in original. See *State v. Hall*, 293 N.C. 559, 238 S.E.2d 473 (1977).

In accord with 3rd paragraph in original. See *State v. Hall*, 293 N.C. 559, 238 S.E.2d 473 (1977).

Mandatory Death Penalty Unconstitutional. —

In accord with 1977 Cum. Supp. See *State v. Mathis*, 293 N.C. 660, 239 S.E.2d 245 (1977).

In light of the holding in *Woodson v. North Carolina*, 428 U.S. 280, 49 L. Ed. 2d 944, 96 S. Ct. 2978 (1976), the death penalty provisions of subdivision (1)(b) have, by implication, been invalidated. *State v. Roberts*, 293 N.C. 1, 235 S.E.2d 203 (1977).

Discretion as to the punishment for rape in the second degree is vested in the trial court, not the Supreme Court. *State v. Goss*, 293 N.C. 147, 235 S.E.2d 844 (1977).

Sufficiency of Indictment. —

Where an indictment is insufficient to charge first-degree rape, but is sufficient to charge second-degree rape, and the evidence is clearly sufficient to support a guilty verdict for that offense, the verdict must be regarded as a verdict of guilty of second-degree rape, and the defendant may not be sentenced for first-degree rape. The case must be remanded for entry of a verdict of guilty of second-degree rape and for a proper judgment on that verdict. *State v. Goss*, 293 N.C. 147, 235 S.E.2d 844 (1977).

Where there was ample evidence presented by the State to show first-degree rape, but the indictment failed to charge that offense since it charged neither the use of a deadly weapon nor infliction of serious bodily injury, nor that defendant, at the time of the offense, was more than 16 years of age, the indictment was insufficient to support a conviction for first-degree rape. Both are elements of the crime which must be alleged and proved to support a conviction. *State v. Goss*, 293 N.C. 147, 235 S.E.2d 844 (1977).

Instructions. —

There was no prejudice to the defendant in the technically erroneous charge in a rape case limiting consideration of the victim's character

to the issue of credibility and not allowing the jury to consider character on the issue of consent where the credibility of the victim's testimony that she did not consent was the key to the State's case, and there was no real distinction between the issue of the victim's credibility and the issue of her consent. *State v. Goss*, 293 N.C. 147, 235 S.E.2d 844 (1977).

The court's failure to charge, etc. —

Where all the evidence in a prosecution for rape reveals a completed act of sexual intercourse and the only dispute between the State and the defendant is whether the act was accomplished by consent or by force, there is no necessity to submit the lesser included offenses of assault with intent to commit rape and assault on a female. *State v. Hall*, 293 N.C. 559, 238 S.E.2d 473 (1977).

Sufficiency of Evidence. —

The evidence in a first-degree rape prosecution was sufficient to support a finding that the victim suffered a serious bodily injury where the victim suffered a hard blow to her upper jaw that left her stunned and dazed and knocked five teeth out of alignment, breaking the root of one tooth, where the teeth had to be deadened, forced back into line and secured with

a metal brace, and where expert medical testimony predicted that the teeth would die and that root canals or actual extraction would be necessary. *State v. Roberts*, 293 N.C. 1, 235 S.E.2d 203 (1977).

Victim's use of the term "rape" in her testimony was clearly a convenient shorthand term, amply defined by the balance of her testimony, and did not constitute an opinion on a question of law. *State v. Goss*, 293 N.C. 147, 235 S.E.2d 844 (1977).

Evidence of Victim's Character Improperly Excluded. — Where the evidence of the victim's character was offered in a rape case according to the standard permissible method of proving character, since the witness's testimony was directed to the "general reputation and character" of the victim and not to his personal opinion, it was error for the court not to allow the jury to consider the witness's testimony on the issue of consent. *State v. Goss*, 293 N.C. 147, 235 S.E.2d 844 (1977).

Applied in *State v. Witherspoon*, 293 N.C. 321, 237 S.E.2d 822 (1977).

Cited in *State v. Shaw*, 293 N.C. 616, 239 S.E.2d 439 (1977).

§ 14-22. Punishment for assault with intent to commit rape.

Section Not Violative of Equal Protection. See *State v. Giles*, 34 N.C. App. 112, 237 S.E.2d 305 (1977).

Who May Be Guilty of Offense — Females. —

The sanctions of this section are equally applicable to a woman who, although incapable

in and of herself of committing a rape, aids, abets and assists a man in the perpetration of an assault with intent to commit a rape. *State v. Giles*, 34 N.C. App. 112, 237 S.E.2d 305 (1977).

Cited in *Thacker v. Garrison*, 445 F. Supp. 376 (W.D.N.C. 1978).

ARTICLE 8.

Assaults.

§ 14-30.1. Malicious throwing of corrosive acid or alkali.

Cited in *Thacker v. Garrison*, 445 F. Supp. 376 (W.D.N.C. 1978).

§ 14-31. Maliciously assaulting in a secret manner.

Submission of Lesser Included Offense. —

Where there was positive evidence that the defendant committed every element of the offense under this section charged in the bill of indictment, and there was no conflicting evidence as to any element of the offense, the defendant's contention that the jury might have

convicted the defendant of the lesser included offense of assault with a deadly weapon if they had been given the opportunity did not support the submission of the lesser included offense to the jury. *State v. McWhorter*, 34 N.C. App. 462, 238 S.E.2d 639 (1977).

§ 14-32. Felonious assault with deadly weapon with intent to kill or inflicting serious injury; punishments.

Defendant Must Be Present at Scene of Assault. — Where the evidence showed that

defendant procured, counseled, commanded or encouraged others to commit an attempted

armed robbery and that he was absent from the scene when the others committed a felonious assault in their attempt to carry out the armed robbery, the felonious assault charge against defendant should not have been submitted to the jury and the trial court should have arrested the judgment on that charge since, in order to be guilty of a felonious assault, a defendant must be present at the scene of the assault either actually or constructively. *State v. Allen*, 34 N.C. App. 260, 237 S.E.2d 869 (1977).

Discharging Firearm into Occupied Building Distinguished. — Discharging a firearm into an occupied building and assault with a deadly weapon inflicting serious injury are entirely separate and distinct offenses. To prove the one, the State must show that defendant fired into an occupied building, an element which need not be shown to support the second charge. Likewise to prove the second charge, it must show the infliction of serious injury, which is not an element of the first charge. *State v. Shook*, 293 N.C. 315, 237 S.E.2d 843 (1977).

Since assault with a deadly weapon and assault by pointing a gun each involve the element of assault on a person, these two criminal offenses contain an element not essential to discharging a firearm into an occupied building and are not, therefore, lesser included offenses of that offense. *State v. Bland*, 34 N.C. App. 384, 238 S.E.2d 199 (1977).

Offense under this Section Is Not, etc. —

Assault with a deadly weapon with intent to kill inflicting serious injury under this section cannot be considered a lesser included offense of armed robbery. The two offenses are separate and complete and an acquittal on the assault charge would not bar a conviction on the armed robbery charge. *State v. Wheeler*, 34 N.C. App. 243, 237 S.E.2d 874 (1977).

What Is a Deadly Weapon. —

A deadly weapon is any instrument which is likely to produce death or great bodily harm, under the circumstances of its use. *State v. Palmer*, 293 N.C. 633, 239 S.E.2d 406 (1977).

May Depend upon Manner of Use. —

In accord with 1977 Cum. Supp. See *State v. Palmer*, 293 N.C. 633, 239 S.E.2d 406 (1977).

And May Be Question of Law or Fact. —

Where the alleged deadly weapon and the manner of its use are of such character as to whether or not it is deadly is one of law, and the

admit of but one conclusion, the question as to court must take the responsibility of so declaring. But where it may or may not be likely to produce fatal results, according to the manner of its use or the part of the body at which the blow is aimed, its alleged deadly character is one of fact to be determined by the jury. *State v. Palmer*, 293 N.C. 633, 239 S.E.2d 406 (1977).

If there is a conflict in the evidence regarding either the nature of the weapon or the manner of its use, with some of the evidence tending to show that the weapon used or as used would not likely produce death or great bodily harm and other evidence tending to show the contrary, the jury must resolve the conflict. *State v. Palmer*, 293 N.C. 633, 239 S.E.2d 406 (1977).

Sufficiency of Indictment. — It is sufficient for indictments or warrants seeking to charge a crime in which one of the elements is the use of a deadly weapon (1) to name the weapon and (2) either to state expressly that the weapon used was a "deadly weapon" or to allege such facts as would necessarily demonstrate the deadly character of the weapon. *State v. Palmer*, 293 N.C. 633, 239 S.E.2d 406 (1977).

Failure to Submit Lesser Offense, etc. —

Defendants in a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury were not entitled to an instruction on the lesser included offense of assault with a deadly weapon where the evidence showed that the victim had been struck in the back of the head with a stick about two feet long; that he was hospitalized for nine days; that a neurosurgeon had to operate in order to repair the injuries to his skull; that fragments of bone had to be peeled back; and that his head is still indented from the injuries. *State v. Davis*, 33 N.C. App. 262, 234 S.E.2d 762 (1977).

Instruction as to Serious Injury. —

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury, where the State's evidence with respect to the injuries is uncontradicted and the injuries could not conceivably be considered anything but serious, the trial judge may instruct the jury that if they believe the evidence as to the injuries, then they will find that there was serious injury. *State v. Davis*, 33 N.C. App. 262, 234 S.E.2d 762 (1977).

Cited in *State v. Hill*, 34 N.C. App. 347, 238 S.E.2d 201 (1977); *State v. Harris*, 34 N.C. App. 491, 238 S.E.2d 642 (1977); *State v. Chapman*, 294 N.C. 407, 241 S.E.2d 667 (1978); *Thacker v. Garrison*, 445 F. Supp. 376 (W.D.N.C. 1978).

§ 14-33. Misdemeanor assaults, batteries, and affrays, simple and aggravated; punishments.

"Deadly Weapon". — A deadly weapon is any instrument which is likely to produce death or its use. *State v. Palmer*, 293 N.C. 633, 239 S.E.2d

great bodily harm, under the circumstances of 406 (1977).

The deadly character of the weapon depends

sometimes more upon the manner of its use, and the condition of the person assaulted, than upon the intrinsic character of the weapon itself. *State v. Palmer*, 293 N.C. 633, 239 S.E.2d 406 (1977).

Where the alleged deadly weapon and the manner of its use are of such character as to admit of but one conclusion, the question as to whether or not it is deadly is one of law, and the court must take the responsibility of so declaring. But where it may or may not be likely to produce fatal results, according to the manner of its use or the part of the body at which the blow is aimed, its alleged deadly character is one of fact to be determined by the jury. *State v. Palmer*, 293 N.C. 633, 239 S.E.2d 406 (1977).

If there is a conflict in the evidence regarding either the nature of the weapon or the manner of its use, with some of the evidence tending to show that the weapon used or as used would not likely produce death or great bodily harm and other evidence tending to show the contrary, the jury must resolve the conflict. *State v. Palmer*, 293 N.C. 633, 239 S.E.2d 406 (1977).

The essential elements of the crime of assault upon a female are (1) assault and (2) upon a female person by a male person. *State v. Craig*, 35 N.C. App. 547, 241 S.E.2d 704 (1978).

Resisting Officer and Assaulting Officer, etc. —

In a prosecution for resisting arrest and assaulting a police officer, the trial court erred in charging the jury that resisting arrest is a lesser included offense of assaulting a police officer where the evidence showed that if the defendant did resist arrest it was by the same means as were charged in the assault case. *State v. Hardy*, 33 N.C. App. 722, 236 S.E.2d 709, cert. denied, 293 N.C. 363, 238 S.E.2d 150 (1977).

In a prosecution for resisting arrest and assaulting a police officer, where the warrants charge the same conduct and the evidence clearly shows that no line of demarcation between defendant's resistance of arrest and his assaults upon the officer could be drawn, the assaults being the means by which the resistance was accomplished, the State must elect between the duplicate charges. *State v. Hardy*, 33 N.C. App. 722, 236 S.E.2d 709, cert. denied, 293 N.C. 363, 238 S.E.2d 150 (1977).

Conviction of Both Resisting Arrest and Assault on Officer. — Where the record revealed that defendant was convicted of both resisting arrest and assault on an officer in the performance of his duties on the same evidence,

the defendant was twice convicted and sentenced for the same criminal offense. The fact that defendant was given concurrent sentences did not make the duplication of punishment and sentences any less a violation of defendant's constitutional right not to be put in jeopardy twice for the same offense. *State v. Raynor*, 33 N.C. App. 698, 236 S.E.2d 307 (1977).

Excessive Force by Officer. — In all cases where the charge is assault on a law officer in violation of subsection (b)(4) of this section, or assault of a law officer with a firearm (§ 14-34.2), the use of excessive force by the law officer in making an arrest or preventing escape from custody does not take the officer outside the performance of his duties, now does it make the arrest unlawful. *State v. Mensch*, 34 N.C. App. 572, 239 S.E.2d 297 (1977).

In a prosecution for assault on a police officer it is not incumbent upon the State to prove that the law officer did not use excessive force in making an arrest, but where there is evidence tending to show the use of such excessive force by the law officer, the trial court should instruct the jury that the assault by the defendant upon the law officer was justified or excused if the assault was limited to the use of reasonable force by the defendant in defending himself from that excessive force. *State v. Mensch*, 34 N.C. App. 572, 239 S.E.2d 297 (1977).

Murder Indictment Does Not Contain all Elements of Assault upon Female. — All of the necessary elements of assault upon a female are not accurately alleged in the regular form indictment charging murder. *State v. Craig*, 35 N.C. App. 547, 241 S.E.2d 704 (1978).

Because an indictment for murder did not contain allegations to include the necessary elements of the crime of assault upon a female, the indictment did not support the verdict of guilty of assault upon a female. *State v. Craig*, 35 N.C. App. 547, 241 S.E.2d 704 (1978).

Sufficiency of Indictment. — It is sufficient for indictments or warrants seeking to charge a crime in which one of the elements is the use of a deadly weapon (1) to name the weapon and (2) either to state expressly that the weapon used was a "deadly weapon" or to allege such facts as would necessarily demonstrate the deadly character of the weapon. *State v. Palmer*, 293 N.C. 633, 239 S.E.2d 406 (1977).

Cited in *Denning v. Lee*, 35 N.C. App. 565, 241 S.E.2d 706 (1978).

§ 14-34. Assaulting by pointing gun.

Intentional Pointing of Pistol, etc. —

The pointing of a gun without legal justification is a violation of this section. *State v. Walker*, 34 N.C. App. 485, 238 S.E.2d 666 (1977).

Discharging Firearm into Occupied Building Distinguished. — Since assault with a deadly weapon and assault by pointing a gun

each involve the element of assault on a person, these two criminal offenses contain an element not essential to discharging a firearm into an

occupied building and are not, therefore, lesser included offenses of that offense. *State v. Bland*, 34 N.C. App. 384, 238 S.E.2d 199 (1977).

§ 14-34.1. Discharging firearm into occupied property.

Assault with Deadly Weapon Distinguished. — Discharging a firearm into an occupied building and assault with a deadly weapon inflicting serious injury are entirely separate and distinct offenses. To prove the one, the State must show that defendant fired into an occupied building, an element which need not be shown to support the second charge. Likewise to prove the second charge, it must show the infliction of serious injury, which is not an element of the first charge. *State v. Shook*, 293 N.C. 315, 237 S.E.2d 843 (1977).

Assault with Deadly Weapon and Assault by Pointing Gun Are Not Lesser Included Offenses. — Since assault with a deadly weapon and assault by pointing a gun each involve the element of assault on a person, these two criminal offenses contain an element not essential to discharging a firearm into an occupied building and are not, therefore, lesser included offenses of that offense. *State v. Bland*,

34 N.C. App. 384, 238 S.E.2d 199 (1977).

Indictment in Words of Section Is Sufficient. — An indictment under this section, which charges the offense substantially in the words of the statute, contains allegations sufficient to apprise an accused of the offense with which he is charged and to enable the court to proceed to judgment. *State v. Walker*, 34 N.C. App. 271, 238 S.E.2d 154 (1977).

Indictment which failed to state that the defendant knew or should have known that the dwelling was occupied by one or more persons was not defective, and the trial court did not err in denying the defendant's motion to dismiss for failure of the indictment to charge a crime under this section. *State v. Walker*, 34 N.C. App. 271, 238 S.E.2d 154 (1977).

Cited in *State v. Hewitt*, 34 N.C. App. 109, 237 S.E.2d 311 (1977), 294 N.C. 316, 239 S.E.2d 833 (1978).

§ 14-34.2. Assault with a firearm or other deadly weapon upon law-enforcement officer or fireman.

Effect of Use of Excessive Force, etc. —

In all cases where the charge is assault on a law officer in violation of § 14-33(b)(4), or assault of a law officer with a firearm (§ 14-34.2), the use of excessive force by the law officer in making an arrest or preventing escape from custody does not take the officer outside the performance of his duties, nor does it make the arrest unlawful. *State v. Mensch*, 34 N.C. App. 572, 239 S.E.2d 297 (1977).

State Need Not Prove Lack of Excessive Force. — In a prosecution for assault on a police officer, it is not incumbent upon the State to

prove that the law officer did not use excessive force in making an arrest. *State v. Mensch*, 34 N.C. App. 572, 239 S.E.2d 297 (1977).

Assault May Be Justified If Excessive Force Used. — Where there is evidence tending to show the use of excessive force by the law officer in making an arrest, the trial court should instruct the jury that the assault by the defendant upon the law officer was justified or excused if the assault was limited to the use of reasonable force by the defendant in defending himself from that excessive force. *State v. Mensch*, 34 N.C. App. 572, 239 S.E.2d 297 (1977).

ARTICLE 10.

Kidnapping and Abduction.

§ 14-39. Kidnapping.

Editor's Note. —

Notes in the bound volume and 1977 Cumulative Supplement are based on former § 14-39, which had been construed as incorporating the common-law elements of kidnapping. They should be read in the light of *State v. Fulcher*, 34 N.C. App. 233, 237 S.E.2d 909 (1977), finding the common law of kidnapping superseded by the 1975 amendment.

Effect of 1975 Amendment. — Though this section, as amended in 1975, is broader than common-law kidnapping in that it eliminates asportation as a necessary element of the crime, it is restrictive in that, by limiting kidnapping to unlawful confinement, restraint or asportation for the purposes enumerated it does not include some of the situations covered by the common-law crime. *State v. Fulcher*, 34 N.C.

App. 233, 237 S.E.2d 909 (1977).

This section, as amended in 1975, removes asportation as an essential element of the crime of kidnapping. *State v. Fulcher*, 34 N.C. App. 233, 237 S.E.2d 909 (1977).

Common Law Superseded. — This section, as amended in 1975, supersedes the common-law crime of kidnapping. *State v. Fulcher*, 34 N.C. App. 233, 237 S.E.2d 909 (1977).

Charge May Be Confined to "Kidnapping by Unlawful Restraint". — Since "confinement" and "restraint" are practically synonymous, and there must be restraint if there is confinement, and since unlawful removal from one place to another must involve unlawful restraint, in any kidnapping case the State may confine the charge against the defendant to kidnapping by unlawful restraint. And if the defendant is charged disjunctively in the language of the statute the trial judge could limit his definition and explanation to the term "unlawful restraint," even though the evidence also tended to show confinement or asportation, or both. *State v. Fulcher*, 34 N.C. App. 233, 237 S.E.2d 909 (1977).

Any unlawful asportation involves unlawful restraint, and any unlawful confinement must involve unlawful restraint. Therefore, if a case were to involve asportation or confinement, it would not be necessary to charge on either. A charge on unlawful restraint would be sufficient. *State v. Fulcher*, 34 N.C. App. 233, 237 S.E.2d 909 (1977).

Confinement Must Be for Substantial Period and Not Incidental to Another Crime. — If the charge against the defendant is kidnapping by unlawful confinement, the trial judge in instructing the jury must define the term in substance as meaning confinement for a substantial period and not merely incidental to the commission of another crime. *State v. Fulcher*, 34 N.C. App. 233, 237 S.E.2d 909 (1977).

Restraint Must Be for Substantial Period and Not Incidental to Another Crime. — If the charge against the defendant is kidnapping by unlawful restraint, the trial judge in instructing the jury must define the term in substance as meaning restraint for a substantial period and not merely incidental to the commission of another crime. *State v. Fulcher*, 34 N.C. App. 233, 237 S.E.2d 909 (1977).

Movement Must Be for Substantial Distance and Not Incidental to Another Crime. — If the charge against the defendant is kidnapping by moving from one place to another, the trial judge in instructing the jury must define the term in substance as meaning movement from one place for a substantial distance and not merely incidental to the commission of another crime. *State v. Fulcher*, 34 N.C. App. 233, 237 S.E.2d 909 (1977).

Purpose of Exposure to Danger Must Be Among Those Enumerated in Statute. —

Regardless of the danger to which the victims are exposed, unless the purpose of the exposure is either felonious, or otherwise enumerated, not merely unlawful, the statutory crime of kidnapping has not been committed. *State v. Fulcher*, 34 N.C. App. 233, 237 S.E.2d 909 (1977).

Felonious Assault Is Separate and Distinct Offense. — In a prosecution for aggravated kidnapping the felonious assault alleged in the indictment as being one of the purposes for which defendant removed the victim from one place to another was not an element of the kidnapping offense, since it was not necessary for the State to prove the felonious assault in order to convict the defendant of kidnapping, but only to prove that the purpose of the removal was a felonious assault. The felonious assault was, consequently, a separate and distinct offense and the defendant could be convicted and sentenced on both the assault and the kidnapping charges. *State v. Dammons*, 293 N.C. 263, 237 S.E.2d 834 (1977).

False Imprisonment. —

The common-law crime of false imprisonment, a general misdemeanor, has not been superseded by this section, as amended in 1975, because there may be an unlawful restraint without the purposes specified in the statute. *State v. Fulcher*, 34 N.C. App. 233, 237 S.E.2d 909 (1977).

Evidence Held Sufficient for Submission to Jury on Charge of Kidnapping. — See *State v. Hoots*, 33 N.C. App. 258, 234 S.E.2d 764 (1977).

Instruction on Elements of Kidnapping, etc. —

An instruction permitting the jury to find either of the defendants guilty of kidnapping if they found from the evidence that he confined, restrained or removed from one place to another either of the victims for the purpose of obtaining information, even though such a purpose is not one of the proscribed purposes set out in subsection (a) of this section was error and entitled the defendants to a new trial. *State v. Hoots*, 33 N.C. App. 258, 234 S.E.2d 764 (1977).

Instructions which merely list but do not define and explain the elements of kidnapping to the jury are not sufficient. *State v. Fulcher*, 34 N.C. App. 233, 237 S.E.2d 909 (1977).

Instructions as to Lesser Included Offenses. —

In appropriate cases the trial judge should instruct the jury on false imprisonment as a lesser offense of kidnapping. *State v. Fulcher*, 34 N.C. App. 233, 237 S.E.2d 909 (1977).

Instructions Held Improper. — Where theories of the crime neither supported by the evidence nor charged in the bill of indictment were included in the trial court's instructions to the jury in a prosecution for aggravated kidnapping, the defendant was entitled to a new trial. *State v. Dammons*, 293 N.C. 263, 237 S.E.2d 834 (1977).

Applied in *State v. Conrad*, 293 N.C. 735, 239 S.E.2d 260 (1977); *State v. Sampson*, 34 N.C. App. 305, 237 S.E.2d 883 (1977).

§ 14-41. Abduction of children.

The proviso in § 14-42 must be read in harmony with this section. *State v. Walker*, 35 N.C. App. 182, 241 S.E.2d 89 (1978).

Father's Consent a Good Defense. —

Where the only inference reasonably deducible from the evidence in a prosecution under this section was that the defendant was acting with the consent of the child's father, the trial court erred in denying the defendant's

motion for judgment as of nonsuit. *State v. Walker*, 35 N.C. App. 182, 241 S.E.2d 89 (1978).

Father Not Guilty in Absence of Order in Favor of Mother. — In the absence of a custody order in favor of the mother, the father of the child taken cannot be guilty of the crime of child abduction. *State v. Walker*, 35 N.C. App. 182, 241 S.E.2d 89 (1978).

§ 14-42. Conspiring to abduct children.

The proviso in this section must be read in harmony with § 14-41. *State v. Walker*, 35 N.C. App. 182, 241 S.E.2d 89 (1978).

SUBCHAPTER IV. OFFENSES AGAINST THE HABITATION AND OTHER BUILDINGS.

ARTICLE 14.

Burglary and Other Housebreakings.

§ 14-51. First and second degree burglary.

In General. —

In accord with 1st paragraph in 1977 Cum. Supp. See *State v. Garrison*, 294 N.C. 270, 240 S.E.2d 377 (1978).

Nighttime. —

In accord with 1st paragraph in 1977 Cum. Supp. See *State v. Garrison*, 294 N.C. 270, 240 S.E.2d 377 (1978).

Intent. —

Felonious intent is an essential element of burglary which the State must allege and prove, and the felonious intent proven must be the felonious intent alleged. *State v. Wilson*, 293 N.C. 47, 235 S.E.2d 219 (1977).

Actual Commission of Felony, etc. —

In accord with 2nd paragraph in 1977 Cum. Supp. See *State v. Wilson*, 293 N.C. 47, 235 S.E.2d 219 (1977).

The crime of burglary is completed by the breaking and entering of the occupied dwelling

of another, in the nighttime, with the requisite ulterior intent to commit the designated felony therein, even though, after entering the house, the accused abandons his intent through fear or because he is resisted. *State v. Wilson*, 293 N.C. 47, 235 S.E.2d 219 (1977).

Indictment Must Charge Intended Felony. —

In accord with 4th paragraph in 1977 Cum. Supp. See *State v. Wilson*, 293 N.C. 47, 235 S.E.2d 219 (1977).

But Not Fully and Specifically. —

In accord with 3rd paragraph in 1977 Cum. Supp. See *State v. Wilson*, 293 N.C. 47, 235 S.E.2d 219 (1977).

It is ordinarily sufficient to state the intended offense generally, as by alleging an intent to steal the goods and chattels of another then being in said dwelling house, or to commit therein the crime of larceny, rape or arson. *State v. Wilson*, 293 N.C. 47, 235 S.E.2d 219 (1977).

§ 14-52. Punishment for burglary.

Applied in *State v. Caldwell*, 293 N.C. 336, 237 S.E.2d 742 (1977).

Cited in *State v. Garrison*, 294 N.C. 270, 240 S.E.2d 377 (1978).

§ 14-54. Breaking or entering buildings generally.

Description of Building. —

The recommended practice is to identify the location of the subject premises by street address, rural road address or some other clear

description. However, an indictment under this section is sufficient if the building allegedly broken and entered is described sufficiently to show that it is within the language of the statute

and to identify it with reasonable particularity so that defendant may prepare his defense and plead his conviction or acquittal as a bar to further prosecution for the same offense. *State v. Baker*, 34 N.C. App. 434, 238 S.E.2d 648 (1977).

Proper Instruction. —

In accord with 1977 Cum. Supp. See *State v. Reagan*, 35 N.C. App. 140, 240 S.E.2d 805 (1978).

Cited in *State v. Sanders*, 294 N.C. 337, 240 S.E.2d 788 (1978); *Thacker v. Garrison*, 445 F. Supp. 376 (W.D.N.C. 1978).

§ 14-56. Breaking or entering into railroad cars, motor vehicles, or trailers; breaking out.

The gravamen of the offense, etc. —

The language of this section does not require the actual larceny of anything in order to convict of felonious breaking or entering. It is the breaking or entering with intent to commit larceny that is proscribed. *State v. Kirkpatrick*, 34 N.C. App. 452, 238 S.E.2d 615 (1977).

The success of the larceny venture does not determine the grade of the breaking or entering as defendants argue. It is only necessary to establish the intent to commit larceny in order

to establish a felonious breaking or entering of the motor vehicle. *State v. Kirkpatrick*, 34 N.C. App. 452, 238 S.E.2d 615 (1977).

Larceny May Be Felony or Misdemeanor. —

This section makes it a felony to break or enter a motor vehicle containing any goods, wares, freight or other thing of value with intent to commit larceny, whether the larceny be felonious or misdemeanor larceny. *State v. Kirkpatrick*, 34 N.C. App. 452, 238 S.E.2d 615 (1977).

§ 14-56.1. Breaking into or forcibly opening coin- or currency-operated machines.

Cited in *Thacker v. Garrison*, 445 F. Supp. 376 (W.D.N.C. 1978).

ARTICLE 15.

Arson and Other Burnings.

§ 14-62. Burning of churches and certain other buildings.

Cited in *State v. McWhorter*, 34 N.C. App. 462, 238 S.E.2d 639 (1977); *Thacker v. Garrison*, 445 F. Supp. 376 (W.D.N.C. 1978).

§ 14-67.1. Burning or attempting to burn other buildings.

Cited in *State v. McWhorter*, 34 N.C. App. 462, 238 S.E.2d 639 (1977).

SUBCHAPTER V. OFFENSES AGAINST PROPERTY.

ARTICLE 16.

Larceny.

§ 14-70. Distinctions between grand and petit larceny abolished; punishment; accessories to larceny.

Larceny under §§ 14-80 and 14-148 Distinguished. — Where there was nothing in the record to establish that the urns or vases stolen by defendant from cemeteries were so connected to the land that they could not be the subject of common-law larceny or that they were

affixed to the soil as tombstones or markers but rather were movable objects of a decorative nature that were easily moved from the grave markers on which they rested, defendant was properly convicted of common-law larceny rather than the offenses under § 14-80 or

§ 14-148. *State v. Schultz*, 34 N.C. App. 120, 237 S.E.2d 349 (1977).

Cited in *State v. Boone*, 33 N.C. App. 378, 235

S.E.2d 74 (1977); *Thacker v. Garrison*, 445 F. Supp. 376 (W.D.N.C. 1978).

§ 14-71. Receiving stolen goods.

Elements of the Offense. —

Where a defendant, charged with a violation of this section, purchases property in a public business from one in custody or possession and with the actual or apparent authority to sell it, the State must prove that the property was taken by the seller in violation of a felony statute, such as § 14-74, and that at the time of the transaction the defendant had knowledge, or reasonable grounds to believe, that the seller had so taken the property and had no authority to transact the sale. *State v. Babb*, 34 N.C. App. 336, 238 S.E.2d 308 (1977).

Receiving Embezzled Property. — This section makes it an offense knowingly to receive embezzled property in violation of a felony embezzlement statute, but such offense is distinct from that of receiving stolen goods, and a charge of receiving stolen goods is not sustained by proof that the goods were merely embezzled. *State v. Babb*, 34 N.C. App. 336, 238 S.E.2d 308 (1977).

§ 14-72. Larceny of property; receiving stolen goods or possessing stolen goods not exceeding \$200.00 in value.

“Felonious intent” is an essential element, etc. —

Where the evidence tends to show that a defendant charged with larceny took or obtained possession of the property by trick or fraud, the burden is on the State to prove that defendant had a felonious intent at the time he took or got possession by trick or fraud. *State v. Harris*, 35 N.C. App. 401, 241 S.E.2d 370 (1978).

Larceny involves a trespass, etc. —

A conviction under this section requires that either an actual or constructive trespass be shown. *State v. Bullin*, 34 N.C. App. 589, 239 S.E.2d 278 (1977).

Sufficiency of Description of Property. —

Whether the description of property in a larceny indictment is sufficient or so defective as to be void depends on the certainty educed by the description. The property alleged to have been taken must be described with “reasonable certainty.” *State v. Boomer*, 33 N.C. App. 324, 235 S.E.2d 284, cert. denied, 293 N.C. 254, 237 S.E.2d 536 (1977).

Reasonable certainty is attained when the description reasonably informs the accused of the transaction meant, when it protects the accused in the event of subsequent prosecutions for the same offense, when it enables the court

Receiving Property in Violation of § 14-74.

— Where an indictment sufficiently alleged feloniously receiving stolen goods knowing them to have been stolen (taken by common-law larceny) in violation of this section, but the State's evidence tended to show that defendant received property which was taken by a shop foreman, in violation of the felony statute, § 14-74, there was a fatal variance in the charge and the proof, a failure by the State to show that the goods were stolen. *State v. Babb*, 34 N.C. App. 336, 238 S.E.2d 308 (1977).

Under this section the property knowingly received or concealed could include not only stolen property but trust property converted in violation of § 14-74 or property taken in violation of any other felony statute. But if the property knowingly received was not stolen but was taken in violation of some felony statute, the indictment should so allege. *State v. Babb*, 34 N.C. App. 336, 238 S.E.2d 308 (1977).

to see that the property described is the subject of larceny, and when it enables the jury to say that the article proved to be stolen is the same as the one described. *State v. Boomer*, 33 N.C. App. 324, 235 S.E.2d 284, cert. denied, 293 N.C. 254, 237 S.E.2d 536 (1977).

When describing an animal in an indictment for larceny, it is sufficient to refer to it by the name commonly applied to animals of its kind without further description. A specific description of the animal, such as its color, age, weight, sex, markings or brand, is not necessary. *State v. Boomer*, 33 N.C. App. 324, 235 S.E.2d 284, cert. denied, 293 N.C. 254, 237 S.E.2d 536 (1977).

The general term “hogs” in a larceny indictment sufficiently described the animals taken so as to identify them with reasonable certainty. *State v. Boomer*, 33 N.C. App. 324, 235 S.E.2d 284, cert. denied, 293 N.C. 254, 237 S.E.2d 536 (1977).

The principle of law known as recent possession, etc. —

Before the presumption of guilt stemming from possession of recently stolen property can attach, the State must show by positive or circumstantial evidence a *prima facie* larceny of the goods. *State v. Boomer*, 33 N.C. App. 324,

235 S.E.2d 284, cert. denied, 293 N.C. 254, 237 S.E.2d 536 (1977).

Possession of a part of the recently stolen property under some circumstances warrants the inference that the accused stole all of it. The inference of guilt is not always repelled by the fact that only part of the recently stolen property is found in the possession of the accused. *State v. Boomer*, 33 N.C. App. 324, 235 S.E.2d 284, cert. denied, 293 N.C. 254, 237 S.E.2d 536 (1977).

Value of Property Taken, Not Property Possessed, Is Determinative. — This section requires the State to prove the value of the property taken, not the property possessed by the accused, to be in excess of \$200. *State v. Boomer*, 33 N.C. App. 324, 235 S.E.2d 284, cert. denied, 293 N.C. 254, 237 S.E.2d 536 (1977).

"**Larceny by trick**" is not a crime separate and distinct from common-law larceny, but the term is often used to describe a larceny when possession was obtained by trick or fraud. It is not necessary that the manner in which the stolen property was taken and carried away be alleged, and the words "by trick" are not

required in an indictment charging larceny. *State v. Harris*, 35 N.C. App. 401, 241 S.E.2d 370 (1978).

Evidence. —

All of the essential elements of larceny must be established by sufficient, competent evidence; and the essential facts can be proved by circumstantial evidence where the circumstance raises a logical inference of the fact to be proved and not just a mere suspicion or conjecture. *State v. Boomer*, 33 N.C. App. 324, 235 S.E.2d 284, cert. denied, 293 N.C. 254, 237 S.E.2d 536 (1977).

Prosecution under § 14-74 Not Barred by Dismissal under this Section. — Since the element of trespass required in this section is not required for prosecution under § 14-74, and the element of trust required under § 14-74 is not required in this section, the dismissal in district court of a charge under this section cannot be considered a prior adjudication which would bar prosecution under § 14-74. *State v. Bullin*, 34 N.C. App. 589, 239 S.E.2d 278 (1977).

Cited in *State v. Sanders*, 294 N.C. 337, 240 S.E.2d 788 (1978).

§ 14-72.1. Concealment of merchandise in mercantile establishments.

Editor's Note. —

For note on the 1971 amendment to this section with regard to the powers of the

merchant and his immunity from suit for malicious prosecution, see 50 N.C.L. Rev. 188 (1971).

§ 14-72.2. Unauthorized use of a motor-propelled conveyance.

Applied in *Ford Marketing Corp. v. Nat'l Grange Mut. Ins. Co.*, 33 N.C. App. 297, 235 S.E.2d 82 (1977).

§ 14-74. Larceny by servants and other employees.

The purpose of this section was to make the conduct described therein a crime because it does not constitute the crime of common-law larceny. *State v. Babb*, 34 N.C. App. 336, 238 S.E.2d 308 (1977).

Trust Relation Necessary. —

This section requires by its express terms that the larceny be committed in violation of a trust relationship between the employee and the employer. *State v. Bullin*, 34 N.C. App. 589, 239 S.E.2d 278 (1977).

Dismissal under § 14-72 No Bar to Prosecution under this Section. — Since the element of trespass required in § 14-72 is not required for prosecution under this section, and the element of trust required under this section is not required in § 14-72, the dismissal in district court of a charge under § 14-72 cannot be considered a prior adjudication which would bar prosecution under this section. *State v. Bullin*, 34 N.C. App. 589, 239 S.E.2d 278 (1977).

§ 14-80. Larceny of wood and other property from land.

Cemetery Urns Unconnected to Land. — Where there was nothing in the record to establish that the urns or vases stolen by defendant from cemeteries were so connected to

the land that they could not be the subject of common-law larceny or that they were affixed to the soil as tombstones or markers but rather were movable objects of a decorative nature that

were easily moved from the grave markers on which they rested, defendant was properly convicted of common-law larceny rather than the offenses under this section or § 14-148. *State v.*

Schultz, 34 N.C. App. 120, 237 S.E.2d 349 (1977).

Applied in *State v. Schultz*, 294 N.C. 281, 240 S.E.2d 451 (1978).

ARTICLE 17.

Robbery.

§ 14-87. Robbery with firearms or other dangerous weapons.

The essential difference, etc. —

In accord with 1977 Cum. Supp. See *State v. Clemmons*, 34 N.C. App. 101, 237 S.E.2d 298 (1977).

Common-Law Robbery Defined. —

In accord with 1st paragraph in original. See *State v. Dixon*, 34 N.C. App. 388, 238 S.E.2d 183 (1977).

In accord with 6th paragraph in 1977 Cum. Supp. See *State v. Dixon*, 34 N.C. App. 388, 238 S.E.2d 183 (1977).

The degree of force used in common-law robbery is immaterial so long as it is sufficient to cause the victim to part with his property. *State v. Dixon*, 34 N.C. App. 388, 238 S.E.2d 183 (1977).

Elements of Crime. — Under this section, an armed robbery is defined as the taking of the personal property of another in his presence or from his person without his consent by endangering or threatening his life with a firearm, with the taker knowing that he is not entitled to the property and the taker intending to permanently deprive the owner of the property. *State v. May*, 292 N.C. 644, 235 S.E.2d 178, 293 N.C. 261 (1977).

The main element of the offense. —

In accord with original. See *State v. Clemmons*, 35 N.C. App. 192, 241 S.E.2d 116 (1978).

Attempt. —

By the terms of this section, the offense is complete if there is an attempt to take personal property by use of firearms or other dangerous weapons. The attempt itself is a violation of the statute and is a felony. *State v. May*, 292 N.C. 644, 235 S.E.2d 178, 293 N.C. 261 (1977).

What Constitutes Attempt. —

In accord with 1st paragraph in 1977 Cum. Supp. See *State v. May*, 292 N.C. 644, 235 S.E.2d 178, 293 N.C. 261 (1977).

The offense is complete if, etc. —

In accord with 1st paragraph in 1977 Cum. Supp. See *State v. Clemmons*, 35 N.C. App. 192, 241 S.E.2d 116 (1978).

Presence of the Victim. — If the force or intimidation by the use of firearms for the purpose of taking personal property has been used and caused the victim in possession or control to flee the premises and this is followed by the taking of the property in a continuous

course of conduct, the taking is from the "presence" of the victim. *State v. Clemmons*, 35 N.C. App. 192, 241 S.E.2d 116 (1978).

The word "presence" taken from the common-law elements and used in an indictment under this section, must be interpreted broadly and with due consideration to the main element of the crime—intimidation or force by the use or threatened use of firearms. *State v. Clemmons*, 35 N.C. App. 192, 241 S.E.2d 116 (1978).

"Presence," in an indictment under this section, means a possession or control by a person so immediate that force or intimidation is essential to the taking of the property. *State v. Clemmons*, 35 N.C. App. 192, 241 S.E.2d 116 (1978).

Allowing Victim to Comment on Punishment of Defendant. — In a prosecution for armed robbery the trial court did not commit prejudicial error by allowing a victim of the attempted armed robbery to make a statement relating to the punishment of the defendant. *State v. Clemmons*, 34 N.C. App. 101, 237 S.E.2d 298 (1977).

When Instruction on Common-Law Robbery, etc. —

In accord with 1st paragraph in 1977 Cum. Supp. See *State v. Clemmons*, 34 N.C. App. 101, 237 S.E.2d 298 (1977).

In accord with 2nd paragraph in 1977 Cum. Supp. See *State v. Clemmons*, 34 N.C. App. 101, 237 S.E.2d 298 (1977).

The evidence did not support an instruction, etc. —

Where the State's evidence was positive and without conflict on all of the elements of the charge of robbery with a firearm, and there was no evidence to the contrary, instructions on the lesser included offenses of common-law robbery, assault with a deadly weapon and simple assault were not required. *State v. Wheeler*, 34 N.C. App. 243, 237 S.E.2d 874 (1977).

Punishment Provisions of Section Valid. —

The punishment provisions of this section are constitutionally valid. *State v. Watson*, 294 N.C. 159, 240 S.E.2d 440 (1978).

Discretion of Trial Judge, etc. —

The actual length of a sentence imposed is at the discretion of a trial judge so long as it is within statutory limits. *State v. Watson*, 294 N.C. 159, 240 S.E.2d 440 (1978).

But Felonious Assault under § 14-32, etc. —

Assault with a deadly weapon with intent to kill inflicting serious injury cannot be considered a lesser included offense of armed robbery. The two offenses are separate and complete and an

acquittal on the assault charge would not bar a conviction on the armed robbery charge. *State v. Wheeler*, 34 N.C. App. 243, 237 S.E.2d 874 (1977).

§ 14-88. Train robbery.

Cited in *Thacker v. Garrison*, 445 F. Supp. 376 (W.D.N.C. 1978).

§ 14-89.1. Safecracking.**Editor's Note. —**

For survey of 1976 case law on criminal law, see 55 N.C.L. Rev. 976 (1977).

Sentence of 48-50 years under former

section held cruel and unusual punishment. See *Thacker v. Garrison*, 445 F. Supp. 376 (W.D.N.C. 1978).

ARTICLE 18.*Embezzlement.***§ 14-90. Embezzlement of property received by virtue of office or employment.****Elements of Offense. —**

Embezzlement in violation of this section requires the establishment of four elements: (1) that the defendant was the agent of the prosecutor; (2) that by the terms of his employment he was to receive the property of his principal; (3) that he received the property in the course of his employment; and (4) that, knowing it was not his own, he converted it to his own use or fraudulently misapplied it. *State v. Ellis*, 33 N.C. App. 667, 236 S.E.2d 299, cert. denied, 293 N.C. 255, 236 S.E.2d 708 (1977).

The offense of embezzlement is exclusively statutory, etc. —

In accord with 2nd paragraph in 1977 Cum. Supp. See *State v. Agnew*, 294 N.C. 382, 241 S.E.2d 684 (1978).

Embezzlement is a statutory crime. *State v. Ellis*, 33 N.C. App. 667, 236 S.E.2d 299, cert. denied, 293 N.C. 255, 236 S.E.2d 708 (1977).

The mere converting or appropriating the property, etc. —

The act of conversion does not raise the presumption of a felonious intent in a prosecution of an indictment for embezzlement. *State v. Agnew*, 33 N.C. App. 496, 236 S.E.2d 287, cert. denied, 293 N.C. 361, 237 S.E.2d 848 (1977).

Necessity of Alleging Ownership. — In an indictment for embezzlement it is necessary to allege ownership of the property in a person, corporation, or other legal entity able to own

property. *State v. Ellis*, 33 N.C. App. 667, 236 S.E.2d 299, cert. denied, 293 N.C. 255, 236 S.E.2d 708 (1977).

Name of Corporation Should Be Given in Indictment. — In an indictment for embezzlement, where the property belongs to a corporation, the name of the corporation should be given, and the fact that it is a corporation stated, unless the name itself imports a corporation. *State v. Ellis*, 33 N.C. App. 667, 236 S.E.2d 299, cert. denied, 293 N.C. 255, 236 S.E.2d 708 (1977).

Fraudulent intent is a necessary element, etc. —

The element of fraudulent intent necessary to sustain an embezzlement conviction may be established by evidence of facts and circumstances from which it reasonably may be inferred, as well as by direct evidence. *State v. Agnew*, 294 N.C. 382, 241 S.E.2d 684 (1978).

Meaning of Fraudulent Intent. —

In accord with original. See *State v. Agnew*, 33 N.C. App. 496, 236 S.E.2d 287, cert. denied, 293 N.C. 361, 237 S.E.2d 848 (1977).

Intent to Return Property Is No Defense. — It is no defense to a prosecution for embezzlement that the defendant intended to return the property obtained or was able and willing to do so at a later date. *State v. Agnew*, 294 N.C. 382, 241 S.E.2d 684 (1978).

Cited in *State v. Babb*, 34 N.C. App. 336, 238 S.E.2d 308 (1977).

§ 14-92. Embezzlement of funds by public officers and trustees.

Meaning of "Willfully and Corruptly". —

The words "willfully" and "corruption," as they relate to misapplication of funds under this section, have been defined as "[d]one with an unlawful intent," and "the act of an official or fiduciary person who unlawfully and wrongfully uses his station or character to procure some benefit for himself or for another person, contrary to duty and the rights of others." State v. Agnew, 294 N.C. 382, 241 S.E.2d 684 (1978).

Fraudulent Intent Necessary. — Unless fraudulent intent is proved, the offense under this section is not proved. State v. Agnew, 33

N.C. App. 496, 236 S.E.2d 287, cert. denied, 293 N.C. 361, 237 S.E.2d 848 (1977).

The fact that a supervisory board has knowledge of a subordinate's unlawful use of public moneys, does not excuse or justify one who knowingly misapplies such funds unlawfully. State v. Agnew, 294 N.C. 382, 241 S.E.2d 684 (1978).

The State need not prove embezzlement or misapplication of the entire sum alleged in the indictment. State v. Agnew, 294 N.C. 382, 241 S.E.2d 684 (1978).

ARTICLE 19.

False Pretenses and Cheats.

§ 14-100. Obtaining property by false pretenses.

Elements of the Crime. —

The essential elements which the State must prove to the satisfaction of the jury beyond a reasonable doubt in order to convict one of the crime of false pretense are a false representation of a subsisting fact or of a future fulfillment or event, calculated to deceive, and which does deceive, and is intended to deceive, whether the representation be in writing, or in words, or in acts, by which one man obtains value from another, without compensation. State v. Agnew, 33 N.C. App. 496, 236 S.E.2d 287, cert. denied, 293 N.C. 361, 237 S.E.2d 848 (1977).

A motion for nonsuit of a charge of obtaining property by false pretense must be denied if there is evidence which, if believed, would establish or from which the jury could reasonably infer that the defendant (1) obtained value from another without compensation, (2) by a false representation of a subsisting fact, or a future fulfillment or event, (3) which was calculated and intended to deceive and (4) did in fact deceive. State v. Agnew, 294 N.C. 382, 241 S.E.2d 684 (1978).

An essential element of the offense proscribed by this section is that the accused "obtain or attempt to obtain" something of value by means of any kind of false pretense. State v. Hadlock, 34 N.C. App. 226, 237 S.E.2d 748 (1977).

Same — Subsisting Fact. —

The cases under this catchline in the bound volume and in the 1977 Cumulative Supplement were decided under this section as it stood before the 1975 amendment. — Ed. note.

The gist of the offense described in this section is obtaining something of value from the owner thereof by false pretense. State v. Wilson, 34 N.C. App. 474, 238 S.E.2d 632 (1977).

False Representation as to Security for

Loan. — The crime of obtaining property by means of a false pretense is committed when one obtains a loan of money by falsely representing the nature of the security given, or by falsely representing that the property pledged as security is free from liens. State v. Tesenair, 35 N.C. App. 531, 241 S.E.2d 877 (1978).

Misrepresentation of Personal Identity. — The crime of obtaining property by means of a false pretense may be committed when one obtains goods on credit by a willful misrepresentation of his identity, quite apart from any intention of the defendant ultimately to pay or not to pay. State v. Tesenair, 35 N.C. App. 531, 241 S.E.2d 877 (1978).

Intent to Repay Is No Defense. — The crime under this section is committed even though the borrower who obtained a loan by means of a false representation may have intended to repay and may even have honestly believed that he would be able to repay. State v. Tesenair, 35 N.C. App. 531, 241 S.E.2d 877 (1978).

The Indictment. —

An indictment was insufficient to charge an offense under this section where the indictment failed to allege that defendant obtained or attempted to obtain anything. State v. Hadlock, 34 N.C. App. 226, 237 S.E.2d 748 (1977).

Indictment Need Not Show Present Form of Property. — It is not legally significant whether the thing gained by the party perpetrating the criminal act under this section is in the same form as it was when taken by false pretense from the owner. Thus, there was no variance in cases where the bills of indictment charged that the defendant obtained money from his employer and the evidence disclosed that he received a color television set and a clothes dryer from another party in exchange for the money pursuant to a prior agreement. State v. Wilson,

34 N.C. App. 474, 238 S.E.2d 632 (1977).

Applied in *State v. Grier*, 35 N.C. App. 119, 239 S.E.2d 870 (1978).

§ 14-106. Obtaining property in return for worthless check, draft or order.

Reference to § 14-107 Harmless Surplusage.

— The reference to § 14-107 in a judgment for violation of this section prior to amendment of the judgment did not vitiate that judgment or render the sentence imposed a sentence in excess of that provided by law for the violation

of this section, which the defendant was found to have committed. The reference to § 14-107 in the judgment was harmless surplusage. *State v. McKinnon*, 35 N.C. App. 741, 242 S.E.2d 545 (1978).

§ 14-107. Worthless checks.

Cited in *State v. McKinnon*, 35 N.C. App. 741, 242 S.E.2d 545 (1978).

ARTICLE 20.

Frauds.

§ 14-118.5. Theft of cable television service. — (a) It shall be unlawful for any person, firm, or corporation to intentionally defraud or to aid and abet another to defraud any person or corporation of the lawful charge, in whole or in part, for any cable television service.

(b) It shall be unlawful for any person, firm, or corporation to intentionally avoid or attempt to avoid or cause or assist another to avoid or attempt to avoid any charge for such service by rearranging, tampering with, or making connection with any facilities or equipment of a cable television company, whether physically, inductively, acoustically, or electrically.

(c) It shall be unlawful for any person, firm, or corporation to advertise or promote the sale of any instrument, apparatus, equipment, or device, or plans or instruction for making or assembling the same, which instrument, apparatus, equipment, or device is designed or adapted to fraudulently avoid the lawful charge for any cable television service in violation of subsections (a) or (b) of this section.

(d) Any person, firm, or corporation that violates the provisions of this section shall be guilty of a misdemeanor punishable by a fine not to exceed three hundred dollars (\$300.00) or by imprisonment for not more than 60 days, or both, in the discretion of the court.

(e) Provided, however, subsections (a) and (b) of this section shall not apply to natural persons receiving cable television service pursuant to contract. (1977, 2nd Sess., c. 1185, s. 1.)

Editor's Note. — Session Laws 1977, 2nd Sess., c. 1185, s. 3, makes the act effective Oct. 1, 1978.

ARTICLE 21.

Forgery.

§ 14-119. Forgery of bank notes, checks and other securities.

Editor's Note. — For survey of 1976 case law on criminal law, see 55 N.C.L. Rev. 976 (1977).

SUBCHAPTER VI. CRIMINAL TRESPASS.

ARTICLE 22.

*Trespasses to Land and Fixtures.***§ 14-148. Removing or defacing monuments and tombstones.**

Cemetery Urns Unconnected to Land. — Where there was nothing in the record to establish that the urns or vases stolen by defendant from cemeteries were so connected to the land that they could not be the subject of common-law larceny or that they were affixed to the soil as tombstones or markers but rather were movable objects of a decorative nature that

were easily moved from the grave markers on which they rested, defendant was properly convicted of common-law larceny rather than the offenses under this section or § 14-80. *State v. Schultz*, 84 N.C. App. 120, 287 S.E.2d 349 (1977).

Applied in *State v. Schultz*, 294 N.C. 281, 240 S.E.2d 451 (1978).

§ 14-155. Unauthorized connections with telephone or telegraph. — It shall be unlawful for any person to tap or make any connection with any wire or apparatus of any telephone or telegraph company operating in this State, except such connection as may be authorized by the person or corporation operating such wire or apparatus. Any person violating this section shall, upon conviction, be fined not more than ten dollars (\$10.00) or imprisoned not more than 10 days for each offense. Each day's continuance of such unlawful connection shall be a separate offense. No connection approved by the Federal Communications Commission or the North Carolina Utilities Commission shall be a violation of this section. (1911, c. 113; C. S., s. 4327; 1973, c. 648; 1977, 2nd Sess., c. 1185, s. 2.)

Cross Reference. — As to theft of cable television service, see § 14-118.5.

Editor's Note. —

The 1977, 2nd Sess., amendment, effective

Oct. 1, 1978, substituted "telephone or telegraph" for "telephone, telegraph or cable television" in the first sentence.

SUBCHAPTER VII. OFFENSES AGAINST PUBLIC MORALITY AND DECENCY.

ARTICLE 26.

*Offenses against Public Morality and Decency.***§ 14-177. Crime against nature.**

Editor's Note. —

For survey of 1974 case law on this section, see 53 N.C.L. Rev. 1037 (1975).

§ 14-190.1. Obscene literature and exhibitions.

Editor's Note. —

For article, "Regulating Obscenity Through the Power To Define and Abate Nuisances," see

14 Wake Forest L. Rev. 1 (1978).

Cited in *State v. Fulcher*, 84 N.C. App. 233, 237 S.E.2d 909 (1977).

§ 14-190.2. Adversary hearing prior to seizure or criminal prosecution.

Editor's Note. —

For article, "Regulating Obscenity Through

the Power To Define and Abate Nuisances," see 14 Wake Forest L. Rev. 1 (1978).

§ 14-196. Using profane, indecent or threatening language to any person over telephone; annoying or harassing by repeated telephoning or making false statements over telephone.

Constitutionality. —

Subsections (a)(1) and (a)(2) as drafted and construed are held unconstitutional as being

overly broad. *Radford v. Webb*, 446 F. Supp. 608 (W.D.N.C. 1978).

§ 14-202.1. Taking indecent liberties with children.

Constitutionality. — The use of language such as "immoral, improper, indecent liberties," and "lewd or lascivious act" in this section is not unconstitutionally vague. *State v. Vebaun*, 34 N.C. App. 700, 239 S.E.2d 705 (1977).

Defendant held to lack standing to challenge constitutionality of section on equal protection grounds. See *State v. Vebaun*, 34 N.C. App. 700, 239 S.E.2d 705 (1977).

Evidence of Prior Misconduct toward Prosecuting Witness. — In a prosecution for taking immoral, improper, and indecent liberties with a female under the age of 16, evidence of

prior misconduct by the defendant toward the prosecuting witness was admissible as an exception to the rule that evidence of independent offenses is not admissible. *State v. Jenkins*, 35 N.C. App. 758, 242 S.E.2d 505 (1978).

The uncorroborated testimony of a victim under this section would be sufficient to convict a defendant if such testimony suffices to establish all the elements of the offense. *State v. Vebaun*, 34 N.C. App. 700, 239 S.E.2d 705 (1977).

Quoted in *State v. Shaw*, 293 N.C. 616, 239 S.E.2d 439 (1977).

ARTICLE 26A.

Adult Establishments.

§ 14-202.10. Definitions.

Editor's Note. —

For article, "Regulating Obscenity Through

the Power To Define and Abate Nuisances," see 14 Wake Forest L. Rev. 1 (1978).

SUBCHAPTER VIII. OFFENSES AGAINST PUBLIC JUSTICE.

ARTICLE 30.

Obstructing Justice.

§ 14-223. Resisting officers.

"Discharging a Duty of His Office". — A police officer attempting to preserve the peace by placing the defendant under arrest for disorderly conduct was performing a duty of his office when the defendant resisted arrest. *State v. Cunningham*, 34 N.C. App. 72, 237 S.E.2d 334 (1977).

Resisting Is Not Lesser Included Offense of Assaulting Officer Where Evidence the Same. — In a prosecution for resisting arrest and assaulting a police officer, the trial court erred in charging the jury that resisting arrest is a lesser included offense of assaulting a police officer where the evidence showed that if the

defendant did resist arrest it was by the same means as were charged in the assault case. *State v. Hardy*, 33 N.C. App. 722, 236 S.E.2d 709, cert. denied, 293 N.C. 363, 238 S.E.2d 150 (1977).

Thus State Must Elect between Duplicate Charges. — In a prosecution for resisting arrest and assaulting a police officer, where the warrants charge the same conduct and the evidence clearly shows that no line of demarcation between defendant's resistance of arrest and his assaults upon the officer could be drawn, the assaults being the means by which the resistance was accomplished, the State must elect between the duplicate charges. *State v.*

Hardy, 33 N.C. App. 722, 236 S.E.2d 709, cert. denied, 293 N.C. 363, 238 S.E.2d 150 (1977).

Conviction of Both Resisting and Assaulting on Same Evidence Violates Double Jeopardy.

— Where the record revealed that defendant was convicted of both resisting arrest and assault on an officer in the performance of his duties on the same evidence, the defendant was twice convicted and sentenced for the same

criminal offense. The fact that defendant was given concurrent sentences did not make the duplication of punishment and sentences any less a violation of defendant's constitutional right not to be put in jeopardy twice for the same offense. *State v. Raynor*, 33 N.C. App. 698, 236 S.E.2d 307 (1977).

Cited in *State v. Stephens*, 35 N.C. App. 335, 241 S.E.2d 382 (1978).

§ 14-225.2. Harassment of and communications with jurors.

Editor's Note. —

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without

regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

§ 14-226. Intimidating or interfering with witnesses. — If any person shall by threats, menaces or in any other manner intimidate or attempt to intimidate any person who is summoned or acting as a witness in any of the courts of this State, or prevent or deter, or attempt to prevent or deter any person summoned or acting as such witness from attendance upon such court, he shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned in the discretion of the court. (1891, c. 87; Rev., s. 3696; C. S., s. 4380; 1977, c. 711, s. 16.)

Editor's Note. — The 1977 amendment, effective July 1, 1978, deleted "juror or" preceding "witness" in two places in the section.

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this

act regarding parole shall not apply to persons sentenced before July 1, 1978."

Session Laws 1977, c. 711, s. 36, contains a severability clause.

Because of the postponed effective date of the 1977 amendment, this section as amended was not set out in the text in the 1977 Cumulative Supplement, but was carried in a note. The amended section is therefore set out in this 1978 Interim Supplement.

ARTICLE 31.

Misconduct in Public Office.

§ 14-234. Director of public trust contracting for his own benefit; participation in business transaction involving public funds.

Local Modification. —

Northampton: 1977, 2nd Sess., c. 1152.

§ 14-242. Failing to return process or making false return.

Quoted in *Rollins v. Gibson*, 293 N.C. 73, 235 S.E.2d 159 (1977).

ARTICLE 33.

Prison Breach and Prisoners.

§ 14-265: Repealed by Session Laws 1977, c. 711, s. 33, effective July 1, 1978.

Editor's Note. —

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without

regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

SUBCHAPTER X. OFFENSES AGAINST THE PUBLIC SAFETY.

ARTICLE 36A.

Riots and Civil Disorders.

§ 14-288.4. Disorderly conduct.

Vague Language in Warrant Disregarded as Surplusage. — Unconstitutionally vague and overly broad language in a warrant for disorderly conduct could be disregarded as surplusage and the conviction under the warrant

upheld where, absent the unconstitutional language, the warrant still alleged all the essential elements of subdivision (a) (2). *State v. Cunningham*, 34 N.C. App. 72, 237 S.E.2d 334 (1977).

SUBCHAPTER XI. GENERAL POLICE REGULATIONS.

ARTICLE 37.

Lotteries and Gaming.

§ 14-289. Advertising lotteries.

Local Modification. — Lenoir: 1977, 2nd Sess., c. 1175; Onslow: 1977, 2nd Sess., c. 1169, repealing.

ARTICLE 39.

Protection of Minors.

§ 14-318.2. Child abuse a general misdemeanor.

Editor's Note. —

For article reviewing the development of

protective services for children in this state, see 54 N.C.L. Rev. 743 (1976).

§ 14-320.1. Transporting child outside the State with intent to violate custody order.

Editor's Note. — For note discussing criminal sanctions against "child-snatching," see 55 N.C.L. Rev. 1275 (1977).

ARTICLE 40.

Protection of the Family.

§ 14-322. Abandonment by husband or parent.

Cited in *State v. Hodges*, 34 N.C. App. 183, 237 S.E.2d 576 (1977).

ARTICLE 42.

Public Drunkenness.

§§ 14-334 to 14-335.1: Repealed by Session Laws 1977, 2nd Session, 1134, s. 6, effective October 1, 1978.

Cross Reference. — For present provisions as to public intoxication, see §§ 14-443 et seq. and 122-65.10 et seq.

ARTICLE 54A.

The Felony Firearms Act.

§ 14-415.1. Possession of firearms, etc., by felon prohibited.

Operability of gun. — Where the State produced evidence tending to prove the defendant's constructive possession of a shotgun within five years from the date of a conviction for felonious assault, but there was no evidence as to whether the shotgun was operable, the evidence was sufficient to require the submission of the case to the jury and to support the verdict. *State v. Baldwin*, 34 N.C. App. 307, 237 S.E.2d 881 (1977).

ARTICLE 58.

Records, Tapes and Other Recorded Devices.

§§ 14-438 to 14-442: Reserved for future codification purposes.

ARTICLE 59.

Public Intoxication.

§ 14-443. Definitions. — As used in this Article:

- (1) "Alcoholism" is the state of a person who habitually lacks self-control as to the use of intoxicating liquor, or uses intoxicating liquor to the extent that his health is substantially impaired or endangered or his social or economic function is substantially disrupted; and
- (2) "Intoxicated" is the condition of a person whose mental or physical functioning is presently substantially impaired as a result of the use of alcohol; and
- (3) A "public place" is a place which is open to the public, whether it is publicly or privately owned. (1977, 2nd Sess., c. 1134, s. 1.)

Editor's Note. — Session Laws 1977, 2nd Sess., c. 1134, s. 8, makes the act effective Oct. 1, 1978.

§ 14-444. Intoxicated and disruptive in public. — (a) It shall be unlawful for any person in a public place to be intoxicated and disruptive in any of the following ways:

- (1) Blocking or otherwise interfering with traffic on a highway or public vehicular area, or
- (2) Blocking or lying across or otherwise preventing or interfering with access to or passage across a sidewalk or entrance to a building, or
- (3) Grabbing, shoving, pushing or fighting others or challenging others to fight, or
- (4) Cursing or shouting at or otherwise rudely insulting others, or
- (5) Begging for money or other property.

(b) Any person who violates this section shall be guilty of a misdemeanor punishable by a fine of not more than fifty dollars (\$50.00) or imprisonment for not more than 30 days. Notwithstanding the provisions of G.S. 7A-273 (1), a magistrate is not empowered to accept a guilty plea and enter judgment for this offense. (1977, 2nd Sess., c. 1134, s. 1.)

§ 14-445. Defense of alcoholism. — (a) It is a defense to a charge of being intoxicated and disruptive in a public place that the defendant suffers from alcoholism.

(b) The presiding judge at the trial of a defendant charged with being intoxicated and disruptive in public shall consider the defense of alcoholism even though the defendant does not raise the defense, and may request additional information on whether the defendant is suffering from alcoholism. (1977, 2nd Sess., c. 1134, s. 1.)

§ 14-446. Disposition of defendant acquitted because of alcoholism. — If a defendant is found not guilty of being intoxicated and disruptive in a public place because he suffers from alcoholism, the court in which he was tried may retain jurisdiction over him for up to 15 days to determine whether he is an alcoholic in need of care as defined by G.S. 122-58.22 or G.S. 122-58.23. The trial judge may make that determination at the time the defendant is found not guilty or he may require the defendant to return to court for the determination at some later time within the 15-day period. (1977, 2nd Sess., c. 1134, s. 1.)

§ 14-447. No prosecution for public intoxication. — (a) No person may be prosecuted solely for being intoxicated in a public place. A person who is intoxicated in a public place and is not disruptive may be assisted as provided in G.S. 122-65.11.

(b) If, after arresting a person for being intoxicated and disruptive in a public place, the law-enforcement officer making the arrest determines that the person would benefit from the care of a shelter or health-care facility as provided in G.S. 122-65.11, and that he would not likely be disruptive in such a facility, the officer may transport and release the person to the appropriate facility and issue him a citation for the offense of being intoxicated and disruptive in a public place. (1977, 2nd Sess., c. 1134, s. 1.)

Chapter 15. Criminal Procedure.

Article 19A. Credits against the Service of Sentences and for At- tainment of Prison Privileges.

Sec.

15-196.1. Credits allowed.

ARTICLE 1.

General Provisions.

§ 15-10.2. Mandatory disposition of detainees — request for final disposition of charges; continuance; information to be furnished prisoner.

Compliance with Section Required. — A defendant cannot claim the benefits afforded by this section without complying with its terms. *State v. McKoy*, 294 N.C. 134, 240 S.E.2d 383 (1978).

Oral requests for trial made by defendant's counsel to the district attorney were not

sufficient to entitle defendant to a dismissal under the provisions of subsection (a) of this section. *State v. McKoy*, 33 N.C. App. 304, 235 S.E.2d 98, cert. denied, 293 N.C. 256, S.E.2d (1977).

Applied in *State v. Dammons*, 293 N.C. 263, 237 S.E.2d 834 (1977).

ARTICLE 7.

Fugitives from Justice.

§ 15-48. Outlawry for felony.

Editor's Note. —

For survey of 1976 case law on constitutional law, see 55 N.C.L. Rev. 965 (1977).

ARTICLE 11.

Forfeiture of Bail.

§§ 15-110 to 15-124: Repealed by Sessions Laws 1977, c. 711 s. 33, effective July 1, 1978.

Editor's Note. —

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without

regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

ARTICLE 15.

Indictment.

§ 15-144. Essentials of bill for homicide.

Killing with Malice, etc. —

An indictment drawn in accordance with this section is sufficient to sustain a verdict of guilty of murder in the first degree based upon a

finding that defendant killed with malice, premeditation and deliberation, or that defendant killed in the perpetration or attempted perpetration of any arson, rape, robbery,

burglary or other felony. *State v. May*, 292 N.C. 644, 235 S.E.2d 178 (1977).

Bill of Particulars. —

In accord with original. See *State v. May*, 292 N.C. 644, 235 S.E.2d 178 (1977).

Cited in *State v. Foster*, 293 N.C. 674, 239 S.E.2d 449 (1977); *State v. Smith*, 294 N.C. 365, 241 S.E.2d 674 (1978).

§ 15-153. Bill or warrant not quashed for informality.

II. GENERAL EFFECT.

Plain, Intelligible, etc. —

In accord with 10th paragraph in original. See *State v. Palmer*, 293 N.C. 633, 239 S.E.2d 406 (1977).

Indictments and warrants need only allege the ultimate facts constituting each element of the criminal offense. Evidentiary matters need not be alleged. *State v. Palmer*, 293 N.C. 633, 239 S.E.2d 406 (1977).

Following Words, etc. —

An indictment couched in the language of the

statute is generally sufficient to charge the statutory offense. *State v. Palmer*, 293 N.C. 633, 239 S.E.2d 406 (1977).

Charging Use of Deadly Weapon. — It is sufficient for indictments or warrants seeking to charge a crime in which one of the elements is the use of a deadly weapon (1) to name the weapon and (2) either to state expressly that the weapon used was a "deadly weapon" or to allege such facts as would necessarily demonstrate the deadly character of the weapon. *State v. Palmer*, 293 N.C. 633, 239 S.E.2d 406 (1977).

§ 15-155. Defects which do not vitiate.

When Time, etc. —

In accord with 2nd paragraph in original. See *State v. Locklear*, 33 N.C. App. 647, 236 S.E.2d 376, cert. denied, 293 N.C. 363, 237 S.E.2d 851 (1977).

Applied in *State v. Tesenair*, 35 N.C. App. 531, 241 S.E.2d 877 (1978).

ARTICLE 16.

Trial before Justice.

§ 15-159: Repealed by Session Laws 1977, c. 711, s. 33, effective July 1, 1978.

Editor's Note. —

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without

regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

ARTICLE 17.

Trial in Superior Court.

§ 15-169. Conviction of assault, when included in charge.

Stated in *State v. Craig*, 35 N.C. App. 547, 241 S.E.2d 704 (1978).

§ 15-170. Conviction for a less degree or an attempt.

The greater crime includes the lesser, so that where an offense is alleged in an indictment, and the jury acquits as to that one, it may convict of

the lesser offense when the charge is inclusive of both offenses. *State v. Craig*, 35 N.C. App. 547, 241 S.E.2d 704 (1978).

§ 15-173. Demurrer to the evidence.

Cited in *State v. Hensley*, 294 N.C. 231, 240 S.E.2d 332 (1978).

§ 15-173.1: Repealed by Session Laws 1977, c. 711, s. 33, effective July 1, 1978.

Editor's Note. —

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without

regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

§ 15-174: Repealed by Session Laws 1977, c. 711, s. 33, effective July 1, 1978.

Editor's Note. —

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without

regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

ARTICLE 17A.

Informing Jury in Case Involving Death Penalty.

§ 15-176.4. Instruction to jury on consequences of guilty verdict.

Editor's Note. — For survey of 1976 case law on criminal procedure, see 55 N.C.L. Rev. 989 (1977).

ARTICLE 17B.

Informing Jury of Possible Punishment upon Conviction.

§ 15-176.9. Loss of motor vehicle driver's license.

Editor's Note. — For survey of 1976 case law on criminal procedure, see 55 N.C.L. Rev. 989 (1977).

ARTICLE 18.

Appeal.

§§ 15-179 to 15-186: Repealed by Session Laws 1977, c. 711, s. 33, effective July 1, 1978.

Editor's Note. —

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without

regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

ARTICLE 19A.

Credits against the Service of Sentences and for Attainment of Prison Privileges.

§ 15-196.1. Credits allowed. — The minimum and maximum term of a sentence shall be credited with and diminished by the total amount of time a defendant has spent, committed to or in confinement in any State or local correctional, mental or other institution as a result of the charge that culminated in the sentence. The credit provided shall be calculated from the date custody under the charge commenced and shall include credit for all time spent in custody pending trial, trial de novo, appeal, retrial, or pending parole and probation revocation hearing: Provided, however, the credit available herein shall not include any time that is credited on the term of a previously imposed sentence to which a defendant is subject. (1973, c. 44, s. 1; 1977, c. 711, s. 16A; 1977, 2nd Sess., c. 1147, s. 30.)

Editor's Note. — Session Laws 1977, 2nd Sess., c. 1147, s. 30, effective July 1, 1978, amended Session Laws 1977, c. 711, by adding thereto a new s. 16A, amending this section. The amendment substituted "The minimum and maximum term of a" for "The term of a determinate sentence or the minimum and maximum term of an indeterminate" at the beginning of the section.

Session Laws 1977, c. 711, s. 39, as amended

by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

§ 15-196.3. Effect of credit.**Editor's Note.** —

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without

regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

ARTICLE 20.

Suspension of Sentence and Probation.

§§ 15-197 to 15-200.1: Repealed by Session Laws 1977, c. 711, s. 33, effective July 1, 1978.

Editor's Note. —

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without

regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

§ 15-205. Duties and powers of the probation officers.**Editor's Note.** —

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all

matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons

sentenced before July 1, 1978.”

§ 15-205.1: Repealed by Session Laws 1977, c. 711, s. 33, effective July 1, 1978.

Editor's Note. —

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: “This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without

regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978.”

ARTICLE 22.

Review of Criminal Trials.

§ 15-217: Repealed by Session Laws 1977, c. 711, s. 33, effective July 1, 1978.

Editor's Note. —

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: “This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without

regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978.”

§§ 15-218 to 15-222: Repealed by Session Laws 1977, c. 711, s. 33, effective July 1, 1978.

Editor's Note. —

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: “This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without

regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978.”

Chapter 15A.
Criminal Procedure Act.

SUBCHAPTER V. CUSTODY.

Article 26.

Bail.

Sec.

- 15A-534. Procedure for determining conditions of pretrial release.

SUBCHAPTER VII. SPEEDY TRIAL; ATTENDANCE OF DEFENDANTS.

Article 35.

Speedy Trial.

- 15A-701. Time limits and exclusions.

SUBCHAPTER X. GENERAL TRIAL PROCEDURE.

Article 58.

Procedures Relating to Guilty Pleas in Superior Court.

- 15A-1021. Plea conference; improper pressure prohibited; submission of arrangement to judge; restitution and reparation as part of plea arrangement agreement, etc.

SUBCHAPTER XII. TRIAL PROCEDURE IN SUPERIOR COURT.

Article 73.

Criminal Jury Trial in Superior Court.

- 15A-1221. Order of proceedings in jury trial; reading of indictment prohibited.
15A-1236. Admonitions to jurors; regulation and separation of jurors.

SUBCHAPTER XIII. DISPOSITION OF DEFENDANTS.

Article 78.

Order of Commitment to Imprisonment.

- 15A-1301. Order of commitment to imprisonment when not otherwise specified.

Article 82.

Probation.

Sec.

- 15A-1341. Probation generally.
15A-1342. Incidents of probation.
15A-1343. Conditions of probation.
15A-1344. Response to violations; alteration and revocation.
15A-1345. Arrest and hearing on probation violation.
15A-1347. Appeal from revocation of probation or imposition of special probation upon violation.

Article 83.

Imprisonment.

- 15A-1351. Sentence of imprisonment; incidents; special probation.
15A-1352. Commitment to Department of Correction or local confinement facility.
15A-1355. Calculation of terms of imprisonment.

Article 85.

Parole.

- 15A-1371. Parole eligibility, consideration, and refusal.
15A-1376. Arrest and hearing on parole violation.
15A-1377. [Repealed.]

SUBCHAPTER XIV. CORRECTION OF ERRORS AND APPEAL.

Article 91.

Appeal to Appellate Division.

- 15A-1446. Requisites for preserving the right to appellate review.
15A-1448. Procedures for taking appeal.

SUBCHAPTER I. GENERAL.

ARTICLE 1.

Definitions and General Provisions.

§ 15A-101. Definitions.

Editor's Note. —

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without

regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

ARTICLE 3.

Venue.

§ 15A-131. Venue generally.

The right to be tried in the county where the charged crime allegedly occurred is statutorily based, and is not a right grounded in the federal

or State constitutions. State v. Hood, 294 N.C. 30, 239 S.E.2d 802 (1978).

§ 15A-133. Waiver of venue; motion for change of venue; indictment may be returned in other county.

Cited in State v. Hood, 294 N.C. 30, 239 S.E.2d 802 (1978).

§ 15A-135. Allegation of venue conclusive in absence of timely motion.

Former Statute. —

The purpose of former § 15-134 was to forestall the possibility that a criminal offender would escape punishment merely because of uncertainty as to the county in which the crime was committed. State v. Batdorf, 293 N.C. 486, 238 S.E.2d 497 (1977).

Burden of Proof Is on State. — This section, like former § 15-134, is silent concerning the burden of proof with regard to proper venue. Hence, the common law controls and the burden of proof is upon the State to show that the

offense occurred in the county named in the bill of indictment. State v. Batdorf, 293 N.C. 486, 238 S.E.2d 497 (1977).

But Venue Need Not Be Shown beyond Reasonable Doubt. — Venue need not be shown beyond a reasonable doubt, since it does not affect the question of a defendant's guilt or the power of the court to try him. Proof of venue by a preponderance of the evidence is sufficient. State v. Batdorf, 293 N.C. 486, 238 S.E.2d 497 (1977).

SUBCHAPTER II. LAW-ENFORCEMENT AND INVESTIGATIVE PROCEDURES.

ARTICLE 9.

Search and Seizure by Consent.

§ 15A-221. General authorization; definition of "consent".

Editor's Note. — For article discussing the search and seizure provisions of Chapter 15A, see 52 N.C.L. Rev. 277 (1973).

An officer's threat to impound defendant's

car if he would not consent to a search of the car did not constitute duress and negate the voluntary character of defendant's consent to search, since the officer had the legal right to

impound the car, where the officer had probable cause to search. *State v. Paschal*, 35 N.C. App. 239, 241 S.E.2d 92 (1978).

§ 15A-222. Person from whom effective consent may be obtained.

A tenant in possession of the premises is a person entitled to give consent to a search of the premises under subdivision (3) of this section. *State v. Reagan*, 35 N.C. App. 140, 240 S.E.2d 805 (1978).

The lessee of an apartment was a person authorized to give consent to a search of the premises. *State v. McNeill*, 33 N.C. App. 317, 235 S.E.2d 274 (1977).

ARTICLE 10.

Other Searches and Seizures.

§ 15A-231. Other searches and seizures.

Editor's Note. — For article discussing the search and seizure provisions of Chapter 15A, see 52 N.C.L. Rev. 277 (1973).

Warrant Not Required Where Article Seized Is in Plain View. —

This section incorporated the United States Supreme Court "plain view" exception to the warrant requirement, which permits inclusion in evidence of the fruit of a legal, warrantless presence. *State v. Blackwelder*, 34 N.C. App. 352, 238 S.E.2d 190 (1977).

But plain view alone is not enough to justify warrantless seizure of evidence. *State v. Blackwelder*, 34 N.C. App. 352, 238 S.E.2d 190 (1977).

Under § 15A-253, the statutory "plain view" doctrine is limited to the inadvertent discovery of items pursuant to a legal search under a valid warrant though these items are not specified in the search warrant. *State v. Blackwelder*, 34 N.C. App. 352, 238 S.E.2d 190 (1977).

Constitutionally permissible seizures under

the "plain view" exception to the Fourth Amendment protection against warrantless searches and seizures have been restricted under § 15A-253 to those instances where the officer has legal justification to be at the place where he inadvertently sees a piece of evidence in plain view. The doctrine serves to supplement the prior justification. *State v. Blackwelder*, 34 N.C. App. 352, 238 S.E.2d 190 (1977).

The search of an automobile, etc. —

Warrantless searches of automobiles and seizures of contraband therefrom without consent are not per se regulated by the North Carolina General Statutes. *State v. Summerlin*, 35 N.C. App. 522, 241 S.E.2d 732 (1978).

A warrantless search of a vehicle capable of movement out of the location or jurisdiction may be conducted by officers when they have probable cause to search and exigent circumstances make it impracticable to secure a search warrant. *State v. Summerlin*, 35 N.C. App. 522, 241 S.E.2d 732 (1978).

ARTICLE 11.

Search Warrants.

§ 15A-241. Definition of search warrant.

Editor's Note. —

For article discussing the search and seizure

provisions of Chapter 15A, see 52 N.C.L. Rev. 277 (1973).

§ 15A-243. Who may issue a search warrant.

Cited in *State v. Summerlin*, 35 N.C. App. 522, 241 S.E.2d 732 (1978).

§ 15A-244. Contents of the application for a search warrant.

Editor's Note. — For comment on testing the credibility of search warrant affidavits, see 54 N.C.L. Rev. 477 (1976).

"Probable Cause". —

In accord with 4th paragraph in original. See *State v. Dailey*, 33 N.C. App. 600, 235 S.E.2d 917, appeal dismissed, 293 N.C. 362, 237 S.E.2d 849 (1977).

Probable cause does not deal in certainties but deals rather in probabilities which are factual and practical considerations of everyday life upon which reasonable and prudent men may act. *State v. Dailey*, 33 N.C. App. 600, 235 S.E.2d 917, appeal dismissed, 293 N.C. 362, 237 S.E.2d 849 (1977).

Warrant May Be Based on Information Not Competent as Evidence. — A valid search warrant may be issued on the basis of an affidavit setting forth information which may not be competent as evidence in a criminal trial. *State v. Dailey*, 33 N.C. App. 600, 235 S.E.2d 917, appeal dismissed, 293 N.C. 362, 237 S.E.2d 849 (1977).

Police Officer May Rely, etc. —

In accord with 1st paragraph in original. See

State v. Dailey, 33 N.C. App. 600, 235 S.E.2d 917, appeal dismissed, 293 N.C. 362, 237 S.E.2d 849 (1977).

Requirements Where Affidavit Based on Hearsay. — The affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant; but the affidavit in such case must contain some of the underlying circumstances from which the affiant's informer concluded that the articles sought were where the informer claimed they were, and some of the underlying circumstances from which the affiant concluded that the informer was credible and his information reliable. *State v. Dailey*, 33 N.C. App. 600, 235 S.E.2d 917, appeal dismissed, 293 N.C. 362, 237 S.E.2d 849 (1977).

Absence of Magistrate's Signature. — Warrant held valid despite the absence of the magistrate's signature. See *State v. Flynn*, 33 N.C. App. 492, 235 S.E.2d 424, cert. denied, 293 N.C. 255, 237 S.E.2d 537 (1977).

§ 15A-245. Basis for issuance of a search warrant; duty of the issuing official.

When Probable Cause Exists. —

In accord with 5th paragraph in original. See *State v. Dailey*, 33 N.C. App. 600, 235 S.E.2d 917, appeal dismissed, 293 N.C. 362, 237 S.E.2d 849 (1977).

In accord with 7th paragraph in original. See *State v. Dailey*, 33 N.C. App. 600, 235 S.E.2d 917, appeal dismissed, 293 N.C. 362, 237 S.E.2d 849 (1977).

Finding May Be Based, etc. —

In accord with 2nd paragraph in original. See *State v. Dailey*, 33 N.C. App. 600, 235 S.E.2d 917, appeal dismissed, 293 N.C. 362, 237 S.E.2d 849 (1977).

An affidavit may be based on hearsay, etc. —

In accord with 3rd paragraph in original. See

State v. Dailey, 33 N.C. App. 600, 235 S.E.2d 917, appeal dismissed, 293 N.C. 362, 237 S.E.2d 849 (1977).

Typographical Error in Year Date. — Albeit subsection (a) of this section places restrictions upon what information can be used by the magistrate in finding probable cause, the trial judge did not go beyond the permissible scope of inquiry when he heard evidence on the issue of a typographical error in the year date. *State v. Beddard*, 35 N.C. App. 212, 241 S.E.2d 83 (1978).

Where the year had recently changed, a typographical error in the year date was not fatal to the sufficiency of the affidavit. *State v. Beddard*, 35 N.C. App. 212, 241 S.E.2d 83 (1978).

§ 15A-249. Officer to give notice of identity and purpose.

Purpose, etc. —

One of the purposes of this section is to protect the public from unreasonable searches and seizures and to guard the right to privacy in homes. *State v. Brown*, 35 N.C. App. 634, 242 S.E.2d 184 (1978).

Notice Held Sufficient. —

See *State v. Fruitt*, 35 N.C. App. 177, 241 S.E.2d 125 (1978).

Cited in *State v. Sutton*, 34 N.C. App. 371, 238 S.E.2d 305 (1977).

§ 15A-251. Entry by force.

Court of Appeals Decision Overruled. — *State v. Watson*, 19 N.C. App. 160, 198 S.E.2d 185 (1973) was overruled by this section. *State*

v. Brown, 35 N.C. App. 634, 242 S.E.2d 184 (1978).

Cited in *State v. Sutton*, 34 N.C. App. 371, 238 S.E.2d 305 (1977).

§ 15A-252. Service of a search warrant.

Cited in *State v. Fruitt*, 35 N.C. App. 177, 241 S.E.2d 125 (1978).

§ 15A-253. Scope of the search; seizure of items not named in the warrant.

Plain view alone is not enough to justify warrantless seizure of evidence. *State v. Blackwelder*, 34 N.C. App. 352, 238 S.E.2d 190 (1977).

Section Restricts "Plain View" Exception to Fourth Amendment. — Constitutionally permissible seizures under the "plain view" exception to the Fourth Amendment protection against warrantless searches and seizures have been restricted under this section to those instances where the officer has legal justification to be at the place where he inadvertently sees a piece of evidence in plain view. The doctrine serves to supplement the prior justification. *State v. Blackwelder*, 34 N.C. App. 352, 238 S.E.2d 190 (1977).

Under this section, the statutory "plain view" doctrine is limited to the inadvertent discovery of items pursuant to a legal search under a valid warrant though these items are not specified in the search warrant. *State v. Blackwelder*, 34 N.C. App. 352, 238 S.E.2d 190 (1977).

This section requires inadvertence of discovery of items not specified in a search warrant. *State v. Absher*, 34 N.C. App. 197, 237 S.E.2d 749 (1977).

Mere suspicion of a thing's existence is clearly not destructive of inadvertence. Knowledge, presumably such as would generate probable cause, is required and a positive intent to search. *State v. Absher*, 34 N.C. App. 197, 237 S.E.2d 749 (1977).

§ 15A-254. List of items seized.

Cited in *State v. Fruitt*, 35 N.C. App. 177, 241 S.E.2d 125 (1978).

ARTICLE 14.

Nontestimonial Identification.

§ 15A-271. Authority to issue order.

Effect of Article. —

The thrust of this article is to provide the State with a valuable new investigative tool to compel the presence of unwilling suspects for nontestimonial identification procedures, even though insufficient probable cause exists to permit their arrest. *State v. Watson*, 294 N.C. 159, 240 S.E.2d 440 (1978).

When Use of Article Unnecessary. — It was unnecessary for the police to utilize the procedures in this article allowing involuntary detention for nontestimonial identification where the defendant voluntarily participated in the pretrial confrontation. *State v. Watson*, 294 N.C. 159, 240 S.E.2d 440 (1978).

§ 15A-279. Implementation of order.

Editor's Note. —

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without

regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

SUBCHAPTER III. CRIMINAL PROCESS.

ARTICLE 17.

Criminal Process.

§ 15A-305. Order for arrest.

Editor's Note. —

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without

regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

SUBCHAPTER IV. ARREST.

ARTICLE 20.

Arrest.

§ 15A-401. Arrest by law-enforcement officer.

I. GENERAL CONSIDERATION.

Mere failure to comply with the letter of this section in making an arrest does not require that evidence discovered as a result of the arrest be excluded. State v. Sutton, 34 N.C. App. 371, 238 S.E.2d 305 (1977).

Identification Evidence Subsequently Obtained Not Excluded. — Nothing in the law of this State requires that identification evidence, obtained subsequent to an illegal arrest, be excluded. State v. Finch, 293 N.C. 132, 235 S.E.2d 819 (1977).

A person has the right, etc. —

In accord with original. See State v. Raynor, 33 N.C. App. 698, 236 S.E.2d 307 (1977).

Civil Liability of Arresting Officer. — For case discussing the civil liability for false imprisonment of an arresting officer, acting under a valid arrest warrant, who arrests the wrong person because of a mistake in the identity of the person arrested, see Robinson v. City of Winston-Salem, 34 N.C. App. 401, 238 S.E.2d 628 (1977).

Applied in State v. Cunningham, 34 N.C. App. 72, 237 S.E.2d 334 (1977).

Stated in State v. Odom, 35 N.C. App. 374, 241 S.E.2d 372 (1978).

The existence of probable cause, etc. —

In accord with 2nd paragraph in original. See State v. Small, 293 N.C. 646, 239 S.E.2d 429 (1977).

To establish probable cause, etc. —

In accord with original. See State v. Small, 293 N.C. 646, 239 S.E.2d 429 (1977).

Probable cause and reasonable ground to believe, etc. —

In accord with 1st paragraph in original. See State v. Small, 293 N.C. 646, 239 S.E.2d 429 (1977).

B. Illustrative Cases.

1. Offense in Presence of Officer.

Threats and Profane Language in Presence of Officer. — The evidence was sufficient to sustain the legality of defendant's arrest without a warrant for disorderly conduct, where, although the arresting officer did not quote the defendant's precise language to the jury, he did testify that the defendant was cursing and threatening a cab driver and that the threats and profane language were continued in the presence of the officer. State v. Raynor, 33 N.C. App. 698, 236 S.E.2d 307 (1977).

Reasonable Grounds to Believe Defendant Was in Possession of Heroin. — Once the arresting agent corroborated the description of the defendant provided by an informant by observing the defendant at the named location, the agent had reasonable grounds to believe the defendant was in possession of heroin, a felony, thereby committing an offense in the agent's presence, and creating probable cause to arrest. State v. Wooten, 34 N.C. App. 85, 237 S.E.2d 301 (1977).

II. ARREST WITHOUT WARRANT.

A. In General.

Whether an arrest warrant must be obtained is determined by State law. State v. Wooten, 34 N.C. App. 85, 237 S.E.2d 301 (1977).

An arrest without warrant except as authorized, etc. —

In accord with 1st paragraph in original. See State v. Small, 293 N.C. 646, 239 S.E.2d 429 (1977).

III. USE OF FORCE IN ARREST.

Use of Force in Case of Assault on Law Officer. — In all cases where the charge is assault on a law officer in violation of § 14-33(b)(4), or assault of a law officer with a firearm (§ 14-34.2), the use of excessive force by the law officer in making an arrest or preventing escape from custody does not take the officer outside the performance of his duties, nor does it make the arrest unlawful. *State v. Mensch*, 34 N.C. App. 572, 239 S.E.2d 297 (1977).

In a prosecution for assault on a police officer

it is not incumbent upon the State to prove that the law officer did not use excessive force in making an arrest, but where there is evidence tending to show the use of such excessive force by the law officer, the trial court should instruct the jury that the assault by the defendant upon the law officer was justified or excused if the assault was limited to the use of reasonable force by the defendant in defending himself from that excessive force. *State v. Mensch*, 34 N.C. App. 572, 239 S.E.2d 297 (1977).

SUBCHAPTER V. CUSTODY.

ARTICLE 23.

Police Processing and Duties upon Arrest.

§ 15A-501. Police processing and duties upon arrest generally.

“Unnecessary Delay” under Subdivision (2). — Subdivision (2) of this section and § 15A-511(a)(1) only require that an arrested person be taken before a magistrate “without unnecessary delay,” and a delay of only one hour after the defendant had been taken into custody and advised of his rights could not be considered undue delay. *State v. Wheeler*, 34 N.C. 243, 237 S.E.2d 874 (1977).

Delay Held Necessary and Reasonable. — The delay between the arrest of the defendant and his appearance before a magistrate was necessary and reasonable where the interim period was spent by the arresting officers in recovering the stolen goods and attempting to locate a person arrested with the defendant who had escaped. *State v. Sings*, 35 N.C. App. 1, 240 S.E.2d 471 (1978).

Violation of Subdivision (2). — Police officers violated subdivision (2) by failing to take defendant before a magistrate without unnecessary delay. *State v. Sanders*, 33 N.C. App. 284, 235 S.E.2d 94, cert. denied, 293 N.C.

257, 235 S.E.2d 539 (1977).

Meaning of Words “Reasonably Necessary” in Subdivision (4). — Based on the official commentary provided by the legislature, the words “reasonably necessary” in subdivision (4) have a stricter meaning than would ordinarily apply. Only exigent circumstances, such as were present in *Stovall v. Denno*, 388 U.S. 293, 87 S. Ct. 1967, 18 L. Ed. 2d 1199 (1967), where the only eyewitness was critically injured, will suffice as “reasonably necessary.” *State v. Sanders*, 33 N.C. App. 284, 235 S.E.2d 94, cert. denied, 293 N.C. 257, 235 S.E.2d 539 (1977).

Violation of Subdivision (4). — Police officers violated subdivision (4) by taking defendant to the town in which the crime was committed for a show-up after they had first prepared to take him before a magistrate in the town in which he was arrested. *State v. Sanders*, 33 N.C. App. 284, 235 S.E.2d 94, cert. denied, 293 N.C. 257, 235 S.E.2d 539 (1977).

Cited in *State v. Watson*, 294 N.C. 159, 240 S.E.2d 440 (1978).

§ 15A-502. Photographs and fingerprints.

Editor's Note. —

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: “This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without

regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978.”

ARTICLE 24.

*Initial Appearance.***§ 15A-511. Initial appearance.****Requirement that Person Be Taken Before Magistrate "Without Unnecessary Delay." —**

Subdivision (a)(1) of this section and § 15A-501(2) only require that an arrested person be taken before a magistrate "without unnecessary delay" and a delay of only one hour after the defendant had been taken into custody and advised of his rights could not be considered undue delay. *State v. Wheeler*, 34 N.C. 243, 237 S.E.2d 874 (1977).

and his appearance before a magistrate was necessary and reasonable where the interim period was spent by the arresting officers in recovering the stolen goods and attempting to locate a person arrested with the defendant who had escaped. *State v. Sings*, 35 N.C. App. 1, 240 S.E.2d 471 (1978).

Cited in *State v. Watson*, 294 N.C. 159, 240 S.E.2d 440 (1978).

Delay Held Necessary and Reasonable. —

The delay between the arrest of the defendant

ARTICLE 26.

*Bail.***§ 15A-534. Procedure for determining conditions of pretrial release.**

(c) In determining which conditions of release to impose, the judicial official must, on the basis of available information, take into account the nature and circumstances of the offense charged; the weight of the evidence against the defendant; the defendant's family ties, employment, financial resources, character, and mental condition; whether the defendant is intoxicated to such a degree that he would be endangered by being released without supervision; the length of his residence in the community; his record of convictions; his history of flight to avoid prosecution or failure to appear at court proceedings; and any other evidence relevant to the issue of pretrial release.

(1977, 2nd Sess., c. 1134, s. 5.)

Editor's Note. —

The 1977, 2nd Sess., amendment, effective Oct. 1, 1978, inserted "whether the defendant is intoxicated to such a degree that he would be

endangered by being released without supervision" near the middle of subsection (c).

As the rest of the section was not changed by the amendment, only subsection (c) is set out.

§ 15A-537. Persons authorized to effect release.**Editor's Note. —**

Sessions Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without

regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

SUBCHAPTER VI. PRELIMINARY PROCEEDINGS.

ARTICLE 29.

First Appearance before District Court Judge.

§ 15A-601. First appearance before a district court judge; right in felony and other cases in original jurisdiction of superior court; consolidation of first appearance before magistrate and before district court judge.

Cited in *State v. Sanders*, 294 N.C. 337, 240 S.E.2d 788 (1978).

§ 15A-606. Demand or waiver of probable-cause hearing.**No Right to Hearing, etc. —**

Subsection (a) of this section requires a probable-cause hearing only in those situations in which no indictment has been returned by a grand jury. *State v. Lester*, 294 N.C. 220, 240 S.E.2d 391 (1978).

A probable-cause hearing is unnecessary after the grand jury finds an indictment. *State v. Lester*, 294 N.C. 220, 240 S.E.2d 391 (1978).

ARTICLE 30.***Probable-Cause Hearing.*****§ 15A-611. Probable-cause hearing procedure.****Hearing Not Required, etc. —**

A probable-cause hearing is unnecessary after

the grand jury finds an indictment. *State v. Lester*, 294 N.C. 220, 240 S.E.2d 391 (1978).

§ 15A-613. Setting offense for trial in district court.

Applied in *State v. Joyner*, 33 N.C. App. 361, 235 S.E.2d 107 (1977).

ARTICLE 31.***The Grand Jury and Its Proceedings.*****§ 15A-622. Formation and organization of grand jury; other preliminary matters.****Editor's Note. —**

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without

regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

ARTICLE 32.***Indictment and Related Instruments.*****§ 15A-641. Indictment and related instruments; definitions of indictment, information, and presentment.**

A presentment does not institute a criminal proceeding, but is only a device whereby the grand jury brings to the attention of the district attorney subject matter which requires investigation by the district attorney and the submission of a properly drawn indictment by him to the grand jury when the facts so warrant. *State v. Cole*, 294 N.C. 304, 240 S.E.2d 355 (1978).

Subsection (c) Codifies Previous Holding of Court. — Subsection (c) of this section codifies and clarifies the holding in *State v. Thomas*, 236 N.C. 454, 73 S.E.2d 283 (1952). *State v. Cole*, 294 N.C. 304, 240 S.E.2d 355 (1978).

§ 15A-646. Superseding indictments and informations.

Stated in *State v. Berry*, 35 N.C. App. 128, 240 S.E.2d 633 (1978).

SUBCHAPTER VII. SPEEDY TRIAL; ATTENDANCE OF DEFENDANTS.

ARTICLE 35.

Speedy Trial.

§ 15A-701. Time limits and exclusions. — (a) The trial of the defendant charged with a criminal offense shall begin within the time limits specified below:

- (1) Within 90 days from the date the defendant is arrested, served with criminal process, waives an indictment or is indicted, whichever occurs last;
- (2) Within 90 days of the giving of notice of appeal in a misdemeanor case for a trial de novo in the superior court;
- (3) When a charge is dismissed, other than under G.S. 15A-703, and the defendant is afterwards charged with the same offense or an offense based on the same act or transaction or on the same series of acts or transactions connected together or constituting parts of a single scheme or plan, then within 90 days from the date that the defendant was arrested, served with criminal process, waived an indictment, or was indicted, whichever occurs last for the original charge;
- (4) When the defendant is to be tried again following a declaration by the trial judge of a mistrial, then within 60 days of that declaration; or
- (5) Within 60 days from the date the action occasioning the new trial becomes final when the defendant is to be tried again following an appeal or collateral attack.

(a1) Notwithstanding the provisions of G.S. 15A-701(a) the trial of a defendant charged with a criminal offense who is arrested, served with criminal process, waives an indictment or is indicted, on or after October 1, 1978, and before October 1, 1980, shall begin within the time limits specified below:

- (1) Within 120 days from the date the defendant is arrested, served with criminal process, waives an indictment, or is indicted, whichever occurs last;
- (2) Within 120 days of the giving of notice of appeal in a misdemeanor case for a trial de novo in the superior court;
- (3) When a charge is dismissed, other than under G.S. 15A-703, and the defendant is afterwards charged with the same offense or an offense based on the same act or transaction or on the same series of acts or transactions connected together or constituting parts of a single scheme or plan, then within 120 days from the date that the defendant was arrested, served with criminal process, waived an indictment, or was indicted, whichever occurs last, for the original charge;
- (4) When the defendant is to be tried again following a declaration by the trial judge of a mistrial, then within 120 days of that declaration; or
- (5) Within 120 days from the date the action occasioning the new trial becomes final when the defendant is to be tried again following an appeal or collateral attack.

(b) The following periods shall be excluded in computing the time within which the trial of a criminal offense must begin:

- (1) Any period of delay resulting from other proceedings concerning the defendant including, but not limited to, delays resulting from
 - a. A mental or physical examination of the defendant, or a hearing on his mental or physical incapacity;
 - b. Trials with respect to other charges against the defendant;

- c. Interlocutory appeals; or
- d. Hearings on pretrial motions or the granting or denial of such motions;
- (2) Any period of delay during which the prosecution is deferred by the prosecutor pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct;
- (3) Any period of delay resulting from the absence or unavailability of the defendant or an essential witness for the defendant or the State. For the purpose of this subdivision, a defendant or an essential witness shall be considered
 - a. Absent when his whereabouts are unknown and he is attempting to avoid apprehension or prosecution or when his whereabouts cannot be determined by due diligence; and
 - b. Unavailable when his whereabouts are known but his presence for testifying at the trial cannot be obtained by due diligence or he resists appearing at or being returned for trial;
- (4) Any period of delay resulting from the fact that the defendant is mentally incapacitated or physically unable to stand trial;
- (5) When a charge is dismissed by the prosecutor under the authority of G.S. 15A-931 and afterwards a new indictment or information is filed against the same defendant or the same defendant is arrested or served with criminal process for the same offense, or an offense based on the same act or transaction or on the same series of acts or transactions connected together or constituting parts of a single scheme or plan, any period of delay from the date the initial charge was dismissed to the date the time limits for trial under this section would have commenced to run as to the subsequent charge;
- (6) A period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted;
- (7) Any period of delay resulting from a continuance granted by any judge if the judge granting the continuance finds that the ends of justice served by granting the continuance outweigh the best interests of the public and the defendant in a speedy trial and sets forth in writing in the record of the case the reasons for so finding.

The factors, among others, which a judge shall consider in determining whether to grant a continuance are as follows:

 - a. Whether the failure to grant a continuance would be likely to result in a miscarriage of justice; and
 - b. Whether the case taken as a whole is so unusual and so complex, due to the number of defendants or the nature of the prosecution or otherwise, that it is unreasonable to expect adequate preparation within the time limits established by this section;
 - c. Repealed by Session Laws 1977, 2nd Sess., c. 1179, s. 6;
- (8) Any period of delay occasioned by the venue of the defendant's case being within a county where, due to limited number of court sessions scheduled for the county, the time limitations of this section cannot reasonably be met;
- (9) A period of delay resulting from the defendant's being in the custody of a penal or other institution of a jurisdiction other than the jurisdiction in which the criminal offense is to be tried;
- (10) A period of delay when the defendant or his attorney has an obligation of service to the State of North Carolina or to the United States government and the court, with the consent of both the defendant and the State, continues the case for a period of time consistent with that obligation; and

- (11) A period of delay from time the prosecutor enters a dismissal with leave for the nonappearance of the defendant until the prosecutor reinstitutes the proceedings pursuant to G.S. 15A-932.
(1977, 2nd Sess., c. 1179, ss. 1-8.)

Editor's Note. —

The 1977, 2nd Sess., amendment substituted "is indicted" for "is notified pursuant to G.S. 15A-630 that an indictment has been filed with the superior court against him" in subdivision (a)(1) and for "is notified pursuant to G.S. 15A-630 that an indictment has been filed against him" in the introductory language and in subdivision (1) of subsection (a1), substituted "was indicted" for "was notified pursuant to G.S. 15A-630 that an indictment has been filed with the superior court against him" near the end of subdivisions (a)(3) and (a1)(3), added "and" at the end of paragraph a of subdivision (b)(7), deleted "and" at the end of paragraph b of subdivision (b)(7), repealed paragraph c of subdivision (b)(7), relating to delay after grand jury proceedings

have begun in certain cases, added "and" at the end of subdivision (b)(10) and added subdivision (b)(11).

Session Laws 1977, c. 787, s. 2, as amended by Session Laws 1977, 2nd Sess., c. 1179, s. 9, provides: "This act shall apply to any person who is arrested, served with criminal process, waives an indictment, or is indicted on or after Oct. 1, 1978."

Session Laws 1977, c. 787, s. 3, which repealed subsection (a1) of this section effective July 1, 1980, was repealed by Session Laws 1977, 2nd Sess., c. 1179, s. 10.

As subsection (c) was not changed by the amendment, it is not set out.

Cited in *Morrison v. Jones*, 565 F.2d 272 (4th Cir. 1977).

ARTICLE 36.

Special Criminal Process for Attendance of Defendants.

§ 15A-711. Securing attendance of criminal defendants confined in institutions within the State; requiring prosecutor to proceed.

Subsection (c) did not give a superior court judge the power to require a trial at a certain session or order a dismissal. The statute requires that the request for speedy trial be served on the solicitor (district attorney), who then has six months to proceed. *State v. Turner*, 34 N.C. App. 78, 237 S.E.2d 318 (1977).

State Must Proceed Within Six Months to Request Defendant's Release for Trial. — Subsection (c) provides that following defendant's request the State must proceed within six months "pursuant to subsection (a)," that is, not to trial but to request a defendant's temporary release for trial, which "temporary release may not exceed 60 days." *State v. Dammons*, 293 N.C. 263, 237 S.E.2d 834 (1977).

The legislature envisioned that trial following a request under subsection (c) would be held within eight months — the six-month period provided by subsection (c) plus the 60-day release period provided by subsection (a). This coincides with the eight-month period set out in § 15-10.2(a). *State v. Dammons*, 293 N.C. 263, 237 S.E.2d 834 (1977).

The fact that the defendant's trial was not held within the six-month period was not a violation of subsection (c), where the State proceeded within the six-month period by making a request for delivery of the defendant for trial. *State v. Turner*, 34 N.C. App. 78, 237 S.E.2d 318 (1977).

ARTICLE 38.

Interstate Agreement on Detainers.

§ 15A-761. Agreement on Detainers entered into; form and contents.

Agreement Inapplicable to North Carolina Prosecution of Defendant Incarcerated in North Carolina. — The Agreement on Detainers has no application to proceedings which involve a North Carolina prosecution and a defendant incarcerated in North Carolina. *State v. Dammons*, 293 N.C. 263, 237 S.E.2d 834 (1977).

Effect of Mistrial on 120-Day Limit on Article IV(c). — For case discussing the effect of a mistrial on the 120-day limit of Article IV(c) of this section, see *State v. Williams*, 33 N.C. App. 344, 235 S.E.2d 269 (1977).

SUBCHAPTER VIII. ATTENDANCE OF WITNESSES; DEPOSITIONS.

ARTICLE 42.

Attendance of Witnesses Generally.

§ 15A-803. Attendance of witnesses.

Cited in *State v. McKoy*, 294 N.C. 134, 240 S.E.2d 383 (1978).

ARTICLE 43.

Uniform Act to Secure Attendance of Witnesses from without a State in Criminal Proceedings.

§ 15A-813. Witness from another state summoned to testify in this State.

Absence of Witness as Grounds for Continuance. — Ordinarily the absence of a witness who could have been served with a subpoena does not constitute grounds for continuance. *State v. Lee*, 293, N.C. 570, 238 S.E.2d 299 (1977).

SUBCHAPTER IX. PRETRIAL PROCEDURE.

ARTICLE 48.

Discovery in the Superior Court.

§ 15A-902. Discovery procedure.

Contention That Prosecution Failed to Comply with Section Held without Merit. — Where there was no showing in the record by the defendant that investigatory evidence of the prosecution not supplied to the defendant following a motion under this section was material or exculpatory, and the defendant was afforded the opportunity to cross-examine the witnesses regarding the evidence, the

defendant's contention that the prosecution failed to comply with this section was without merit. *State v. May*, 292 N.C. 644, 235 S.E.2d 178 (1977).

Applied in *State v. Gillespie*, 33 N.C. App. 684, 236 S.E.2d 190 (1977).

Cited in *State v. McKoy*, 294 N.C. 134, 240 S.E.2d 383 (1978).

§ 15A-903. Disclosure of evidence by the State — information subject to disclosure.

What Evidence Not Discoverable. — Internal police reports and memoranda pertaining to a criminal case, statements by witnesses other than the defendant and the criminal records of witnesses other than the defendant are not made discoverable by this section. *State v. Gillespie*, 33 N.C. App. 684, 236 S.E.2d 190 (1977).

Same — Prior Recorded Statement of State Witness. — Standing alone, subsection (d) of this section would allow discovery of a prior recorded statement of a State witness. On its face, subsection (d) would permit the discovery of any recorded or written statement that is material to the preparation of the defense. However, the

statutory scheme must be construed in its entirety. The very next section, § 15A-904, limits this section and is dispositive of the issue of prosecution witnesses' statements. Section 15A-904(a) provides that production of statements made by witnesses or prospective witnesses of the State to anyone acting on behalf on the State is not required. *State v. Hardy*, 293 N.C. 105, 235 S.E.2d 828 (1977).

A trial judge's pretrial discovery order contemplating pretrial discovery by a defendant of a prosecution witness's prior statements would exceed the judge's authority. *State v. Hardy*, 293 N.C. 105, 235 S.E.2d 828 (1977).

Cited in *State v. Hill*, 294 N.C. 320, 240 S.E.2d 794 (1978).

§ 15A-904. Disclosure of evidence by the State — certain reports not subject to disclosure.

Certain Categories of Evidence Not Discoverable. — Discovery of internal police reports and memoranda pertaining to a criminal case, statements by witnesses other than the defendant, and the criminal records of witnesses other than the defendant are not compelled. *State v. Gillespie*, 33 N.C. App. 684, 236 S.E.2d 190 (1977).

Section Limits § 15A-903. — Standing alone, § 15A-903(d) would allow discovery of a prior recorded statement of a State witness. On its face, § 15A-903(d) would permit the discovery of any recorded or written statement that is material to the preparation of the defense. However, the statutory scheme must be construed in its entirety. The very next section limits § 15A-903 and is dispositive of the issue of prosecution witnesses' statements. Subsection (a) of this section provides that production of statements made by witnesses or prospective witnesses of the State to anyone acting on behalf of the State is not required. *State v. Hardy*, 293 N.C. 105, 235 S.E.2d 828 (1977).

Trial Court Has No Authority to Order Discovery Contrary to Section. — Where a statute expressly restricts pretrial discovery, as does subsection (a) of this section, the trial court has no authority to order discovery. This holding is in accordance with the federal courts' interpretation of their analogous provisions found in Fed. R. Crim. P. 16, and the Jencks Act, 18 U.S.C. § 3500. *State v. Hardy*, 293 N.C. 105, 235 S.E.2d 828 (1977).

A trial judge's pretrial discovery order contemplating pretrial discovery by a defendant of a prosecution witness's prior statements would exceed the judge's authority. *State v. Hardy*, 293 N.C. 105, 235 S.E.2d 828 (1977).

Identity of State Witnesses Is Shielded Prior to Trial. — Subsection (a) of this section is consistent with the legislature's desire, elsewhere expressed, to have the identity of State's witnesses shielded prior to trial. *State v. Hardy*, 293 N.C. 105, 235 S.E.2d 828 (1977).

But subsection (a) does not bar discovery of prosecution witnesses' statements at trial. *State v. Hardy*, 293 N.C. 105, 235 S.E.2d 828 (1977).

§ 15A-906. Disclosure of evidence by the defendant — certain evidence not subject to disclosure.

The work product doctrine applies in criminal as well as civil cases. *State v. Hardy*,

Election to Use Person as Witness Waives Privilege. — By electing to use a person as a witness the State waived any privilege it might have had with respect to matters covered in his testimony. *State v. Hardy*, 293 N.C. 105, 235 S.E.2d 828 (1977).

The work product doctrine applies in criminal as well as civil cases. *State v. Hardy*, 293 N.C. 105, 235 S.E.2d 828 (1977).

Purpose of Work Product Doctrine. — The work product doctrine was designed to protect the mental processes of the attorney from outside interference and provide a privileged area in which he can analyze and prepare his client's case. *State v. Hardy*, 193 N.C. 105, 235 S.E.2d 828 (1977).

The work product doctrine is a qualified privilege for certain materials prepared by an attorney acting on behalf of his client in anticipation of litigation. *State v. Hardy*, 293 N.C. 105, 235 S.E.2d 828 (1977).

And Can Be Waived. — The work product privilege, like any other qualified privilege, can be waived. *State v. Hardy*, 293 N.C. 105, 235 S.E.2d 828 (1977).

The work product privilege is certainly waived when the defendant or the State seeks at trial to make a testimonial use of the work product. *State v. Hardy*, 293 N.C. 105, 235 S.E.2d 828 (1977).

What Constitutes Work Product. — Only roughly and broadly speaking can a statement of a witness that is reduced verbatim to a writing or a recording by an attorney be considered work product, if at all. It is work product only in the sense that it was prepared by the attorney or his agent in anticipation of trial. Such a statement is not work product in the same sense that an attorney's impressions, opinions and conclusions or his legal theories and strategies are work product. *State v. Hardy*, 293 N.C. 105, 235 S.E.2d 828 (1977).

The work product doctrine has been extended to protect materials prepared for the attorney by his agents as well as those prepared by the attorney himself. *State v. Hardy*, 293 N.C. 105, 235 S.E.2d 828 (1977).

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The work product doctrine has been extended

to protect materials prepared for the attorney by his agents as well as those prepared by the attorney himself. *State v. Hardy*, 293 N.C. 105, 235 S.E.2d 828 (1977).

The work product doctrine is a qualified privilege for certain materials prepared by an attorney acting on behalf of his client in anticipation of litigation. *State v. Hardy*, 293 N.C. 105, 235 S.E.2d 828 (1977).

And Can Be Waived. — The work product privilege, like any other qualified privilege, can be waived. *State v. Hardy*, 293 N.C. 105, 235 S.E.2d 828 (1977).

The work product privilege is certainly waived when the defendant or the State seeks at trial to make a testimonial use of the work product. *State v. Hardy*, 293 N.C. 105, 235 S.E.2d 828 (1977).

§ 15A-907. Continuing duty to disclose.

Cited in *State v. Hill*, 294 N.C. 320, 240 S.E.2d 794 (1978).

§ 15A-910. Regulation of discovery — failure to comply.

Particular Remedy, etc. —

In accord with 4th paragraph in original. See *State v. Hill*, 294 N.C. 320, 240 S.E.2d 794 (1978).

By its express terms, this section authorizes, but does not require, the trial court to prohibit the party offering nondisclosed evidence from introducing it. This is left to the discretion of the

trial court. *State v. Shaw*, 293 N.C. 616, 239 S.E.2d 439 (1977).

And not reviewable, etc. —

In accord with original. See *State v. Hill*, 294 N.C. 320, 240 S.E.2d 794 (1978).

Applied in *State v. Cross*, 293 N.C. 296, 237 S.E.2d 734 (1977).

ARTICLE 49.

Pleadings and Joinder.

§ 15A-923. Use of pleadings in felony cases and misdemeanor cases initiated in the superior court division.

The term "amendment" in subsection (e) is defined as any change in the indictment which would substantially alter the charge set forth in the indictment. *State v. Carrington*, 35 N.C.

App. 53, 240 S.E.2d 475 (1978).

Applied in *State v. Tesenair*, 35 N.C. App. 531, 241 S.E.2d 877 (1978).

§ 15A-924. Contents of pleadings; duplicity; alleging and proving previous convictions; failure to charge crime; surplusage.

Applied in *State v. Palmer*, 293 N.C. 633, 239 S.E.2d 406 (1977).

Quoted in *State v. Dammons*, 293 N.C. 263, 237 S.E.2d 834 (1977).

Cited in *State v. May*, 292 N.C. 644, 235 S.E.2d 178 (1977); *State v. Harris*, 35 N.C. App. 401, 241 S.E.2d 370 (1978).

§ 15A-925. Bill of particulars.

Cited in *State v. May*, 292 N.C. 644, 235 S.E.2d 178 (1977); *State v. Harris*, 35 N.C. App. 401, 241 S.E.2d 370 (1978).

§ 15A-926. Joinder of offenses and defendants.

I. GENERAL CONSIDERATION.

In General. —

In accord with 13th paragraph in original. See *State v. Hardy*, 293 N.C. 105, 235 S.E.2d 828 (1977).

In accord with 17th paragraph in original. See *State v. Travis*, 33 N.C. App. 330, 235 S.E.2d 66, cert. denied, 293 N.C. 163, 236 S.E.2d 707 (1977).

Consolidation Is within Discretion of Court. —

In accord with 13th paragraph in original. See *State v. Greene*, 294 N.C. 418, 241 S.E.2d 662 (1978).

The question of consolidating offenses arising out of a single scheme or plan ordinarily is a matter within the discretion of the trial judge and his decision will not be disturbed absent a showing of abuse of discretion. *State v. Wheeler*, 34 N.C. App. 243, 237 S.E.2d 874 (1977).

In the absence of a showing that the joint trial deprived defendant of a fair trial, the exercise of the trial court's discretion in ordering the consolidation will not be disturbed upon appeal. *State v. Travis*, 33 N.C. App. 330, 235 S.E.2d 66, cert. denied, 293 N.C. 163, 236 S.E.2d 707 (1977).

Exercise of discretion, etc. —

In accord with 4th paragraph in original. See *State v. Hardy*, 293 N.C. 105, 235 S.E.2d 828 (1977).

This section differs from its predecessor, former § 15-152, in that it does not permit joinder on the basis that the acts were of the same class of crime or offense when there is no transactional connection, and in that it contains new language permitting joinder of offenses or crimes which are based on a series of acts or transactions "constituting parts of a single scheme or plan." *State v. Greene*, 294 N.C. 418, 241 S.E.2d 662 (1978).

The nature of the offenses is one of the factors which may properly be considered in determining whether certain acts or transactions constitute "parts of a single scheme or plan," as those words are used in subsection (a). *State v. Greene*, 34 N.C. App. 149, 237 S.E.2d 325 (1977).

Although this section does not permit joinder of offenses solely on the basis that they are of the same class, the nature of the offenses is one of the factors which may properly be considered in determining whether certain acts or transactions constitute "parts of a single scheme or plan," as those words are used in subsection (a) of this section. *State v. Greene*, 294 N.C. 418, 241 S.E.2d 662 (1978).

Judge Should Consider Whether Accused Can Be Fairly Tried. —

In ruling upon a motion for joinder of offenses, the trial judge should consider whether the accused can be fairly tried if joinder is permitted. If joinder would hinder or deprive defendant of his ability to present his defense, the motion should be denied. *State v. Greene*, 294 N.C. 418, 241 S.E.2d 662 (1978).

Offenses Separate in Time and Place and Distinct in Circumstances. —

In determining whether an accused has been prejudiced by joinder, the question is not whether the evidence at the trial of one case would be competent and admissible at the trial of the other. The question is whether the offenses are so separate in time and place and so distinct in circumstances as to render a consolidation unjust and prejudicial to defendant. *State v. Greene*, 294 N.C. 418, 241 S.E.2d 662 (1978).

II. ILLUSTRATIVE CASES.

A. Joinder of Offenses.

Murder and Solicitation to Commit Murder.

— This section was not applicable in prosecutions for murder and solicitation of another to commit murder where at the time of the defendant's first trial for murder no indictments had yet been returned against him for solicitation, and where there was nothing in the record to indicate that the State held the solicitation charges in reserve pending the outcome of the murder trial. *State v. Furr*, 292 N.C. 711, 235 S.E.2d 193 (1977).

Assault with Intent to Rape on One Victim and Rape and Kidnapping of Another. —

The consolidation for trial of charges of assault with intent to rape against one victim, and second-degree rape and kidnapping against another victim was within the sound discretion of the trial judge since the offenses for which defendant was tried occurred in a single afternoon within a three-hour period, with a time lapse of approximately one hour and 25 minutes between offenses, and the offenses were similar in nature and occurred within such a short time span that they could logically be considered "all parts of a continuing program of action by the defendant." *State v. Greene*, 34 N.C. App. 149, 237 S.E.2d 325 (1977).

B. Joinder of Defendants for Trial.

Where Witness for One Defendant was Attorney Representing Other Defendant. —

There was no irreparable prejudice in the consolidation for trial of the charges against two

defendants where one of the witnesses for one of the defendants was the attorney representing the other defendant. *State v. Travis*, 33 N.C.

App. 330, 235 S.E.2d 66, cert. denied, 293 N.C. 163, 236 S.E.2d 707 (1977).

§ 15A-927. Severance of offenses; objection to joinder of defendants for trial.

Unsupported Statement of Possible Prejudice Insufficient to Show Abuse of Discretion. — Where defendant's only assertion of possible prejudice was that he might have elected to testify in one of the cases and not in the others, this unsupported statement of possible prejudice was not sufficient to show

abuse of discretion on the part of the trial judge in denying defendant's motion to sever the cases for trial. *State v. Sutton*, 34 N.C. App. 371, 238 S.E.2d 305 (1977).

Cited in *State v. Hardy*, 293 N.C. 105, 235 S.E.2d 828 (1977).

ARTICLE 50.

Voluntary Dismissal.

§ 15A-931. Voluntary dismissal of criminal charges by the State.

Quoted in *State v. Hice*, 34 N.C. App. 468, 238 S.E.2d 619 (1977).

ARTICLE 51.

Arraignment.

§ 15A-941. Arraignment before judge.

Cited in *State v. Cross*, 293 N.C. 296, 237 S.E.2d 734 (1977).

§ 15A-942. Right to counsel.

Applied in *State v. Sanders*, 294 N.C. 337, 240 S.E.2d 788 (1978).

§ 15A-943. Arraignment in superior court — required calendaring.

Subsection (b) sets forth a statutory right of each defendant "not [to] be tried without his consent in the week in which he is arraigned." *State v. Shook*, 293 N.C. 315, 237 S.E.2d 843 (1977).

Subsection (b) vests a defendant with a right, for by its terms it requires his consent before a different procedure can be used. *State v. Shook*, 293 N.C. 315, 237 S.E.2d 843 (1977).

Purpose of Subsection (b). — Subsection (b) is designed to ensure both the State and the defendant a sufficient interlude to prepare for trial. This is necessary because before arraignment neither the State nor defendant may know whether the case need proceed to trial. *State v. Shook*, 293 N.C. 315, 237 S.E.2d 843 (1977).

The financial interest of the State as well as

the private interests of the individual jurors and witnesses are served by requiring arraignments to be calendared on days when jurors and witnesses are not called. *State v. Shook*, 293 N.C. 315, 237 S.E.2d 843 (1977).

The week's interim provided in subsection (b) assures an opportunity for trial preparation and thereby helps to avoid preparation which may well be not only extensive but also unnecessary. *State v. Shook*, 293 N.C. 315, 237 S.E.2d 843 (1977).

The provisions of subsection (b) are more than directory. *State v. Shook*, 293 N.C. 315, 237 S.E.2d 843 (1977).

No Arraignment May Take Place Except at Time Calendared. — In order to effect the intent of the legislature, this statute must be construed to require not only that the solicitor

"calendar arraignments" as provided but also that every arraignment be calendared and that, absent any waiver, no arraignment may take place except at a time when it is so calendared. *State v. Shook*, 293 N.C. 315, 237 S.E.2d 843 (1977).

Prejudice Presumed from Violation of Subsection (b). — To require a defendant to show prejudice when asserting the violation of his statutory right under subsection (b), which he has insisted upon at trial, would be manifestly contrary to the intent of the legislature, which has provided that the week's time between arraignment and trial must be accorded him unless he consents to an earlier trial. Prejudice under these circumstances must necessarily be presumed. *State v. Shook*, 293 N.C. 315, 237 S.E.2d 843 (1977).

And Violation Is Reversible Error. — The

infringement of the defendant's right under subsection (b) not to be tried without his consent during the week following his not guilty plea, where there was no waiver by defendant, was reversible error. *State v. Shook*, 293 N.C. 315, 237 S.E.2d 843 (1977).

Facts Showing Violation of Subsection (b). — The trial court violated the provisions of subsection (b) by proceeding with defendant's trial over his objection on the same day as his arraignment. *State v. Shook*, 293 N.C. 315, 237 S.E.2d 843 (1977).

The trial court violated the provisions of subsection (a) in failing to require that defendant's arraignment be calendared and held on a day provided by that subsection when no jury trial was scheduled. *State v. Shook*, 293 N.C. 315, 237 S.E.2d 843 (1977).

ARTICLE 52.

Motions Practice.

§ 15A-952. Pretrial motions; time for filing; sanction for failure to file; motion hearing date.

Applied in *State v. Berry*, 35 N.C. App. 128, 240 S.E.2d 633 (1978).

Stated in *State v. Johnson*, 35 N.C. App. 729, 242 S.E.2d 517 (1978).

Cited *State v. Vincent*, 35 N.C. App. 369, 241 S.E.2d 390 (1978); *State v. Harris*, 35 N.C. App. 401, 241 S.E.2d 370 (1978).

§ 15A-957. Motion for change of venue.

Cited in *State v. Hood*, 294 N.C. 30, 239 S.E.2d 802 (1978).

§ 15A-959. Notice of defense of insanity; pretrial determination of insanity.

Editor's Note. —

Session Laws 1977, c. 711, s. 39 as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

Time for Filing of Notice. — Although no

reference is made in subsection (a) of this section to a specific subsection of § 15A-952, it seems clear that § 15A-952(c) covers the time within which pretrial motions must be made. *State v. Johnson*, 35 N.C. App. 729, 242 S.E.2d 517 (1978).

Proof of Insanity Where Notice Rejected as Untimely. — Under the general plea of not guilty, a defendant may prove affirmative defenses such as insanity even if his notice under subsection (a) has been rejected as untimely. *State v. Johnson*, 35 N.C. App. 729, 242 S.E.2d 517 (1978).

ARTICLE 53.

*Motion to Suppress Evidence.***§ 15A-971. Definitions.****Editor's Note. —**

For article discussing the search and seizure

provisions of Chapter 15A, see 52 N.C.L. Rev. 277 (1973).

§ 15A-974. Exclusion or suppression of unlawfully obtained evidence.

Suppression of Evidence under Subdivision (1). — Subdivision (1) of this section mandates the suppression of evidence only when the evidence sought to be suppressed is obtained in violation of defendant's constitutional rights. *State v. Wilson*, 293 N.C. 47, 235 S.E.2d 219 (1977).

Failure of an officer to comply strictly with provisions of §§ 15A-252 and 15A-254 was not a "substantial" violation of Chapter 15A within the meaning of subdivision (2) of this

section. See *State v. Fruitt*, 35 N.C. App. 177, 241 S.E.2d 125 (1978).

Applied in *State v. Sanders*, 33 N.C. App. 284, 235 S.E.2d 94 (1977); *State v. Brown*, 35 N.C. App. 634, 242 S.E.2d 184 (1978).

Stated in *State v. Boone*, 293 N.C. 702, 239 S.E.2d 459 (1977).

Cited in *State v. Sutton*, 34 N.C. App. 371, 238 S.E.2d 305 (1977); *State v. Watson*, 294 N.C. 159, 240 S.E.2d 440 (1978).

§ 15A-975. Motion to suppress evidence in superior court prior to trial and during trial.

Applied in *State v. Hill*, 294 N.C. 320, 240 S.E.2d 794 (1978).

§ 15A-976. Timing of pretrial suppression motion and hearing.

Applied in *State v. Hill*, 294 N.C. 320, 240 S.E.2d 794 (1978).

§ 15A-977. Motion to suppress evidence in superior court; procedure.

Cited in *State v. Boone*, 293 N.C. 702, 239 S.E.2d 459 (1977); *State v. Summerlin*, 35 N.C. App. 522, 241 S.E.2d 732 (1978).

§ 15A-979. Motion to suppress evidence in superior and district court; orders of suppression; effects of orders and of failure to make motion.

Cited in *State v. Flynn*, 33 N.C. App. 492, 235 S.E.2d 424 (1977); *State v. Dailev*, 33 N.C. App. 600, 235 S.E.2d 917 (1977); *State v. Thomas*, 34 N.C. App. 534, 239 S.E.2d 281 (1977); *State v. Fruitt*, 35 N.C. App. 177, 241 S.E.2d 125 (1978);

State v. Paschal, 35 N.C. App. 239, 241 S.E.2d 92 (1978); *State v. Odom*, 35 N.C. App. 374, 241 S.E.2d 372 (1978); *State v. Summerlin*, 35 N.C. App. 522, 241 S.E.2d 732 (1978).

SUBCHAPTER X. GENERAL TRIAL PROCEDURE.

ARTICLE 56.

*Incapacity to Proceed.***§ 15A-1002. Determination of incapacity to proceed; evidence; temporary commitment; temporary orders.**

Test of Capacity to Stand Trial. — In determining a defendant's capacity to stand trial, the test is whether he has the capacity to comprehend his position, to understand the nature and object of the proceedings against him, to conduct his defense in a rational manner, and to cooperate with his counsel to the end that any available defense may be interposed. *State v. Bundridge*, 294 N.C. 45, 239 S.E.2d 811 (1978), decided under repealed § 122-84.

Decision Rests Within Discretion of Trial Court. — Under former § 122-91, the decision whether to grant a motion for commitment for psychiatric examination to determine competency lay within the sound discretion of the trial judge. This section contains no provision making the granting of such a motion mandatory, and the decision remains within the sound judicial discretion of the trial court. *State v. Woods*, 293 N.C. 58, 235 S.E.2d 47 (1977).

That defendant is an indigent is irrelevant to the applicability of this section. *State v. Woods*, 293 N.C. 58, 235 S.E.2d 47 (1977).

No Equal Protection Issue Presented by Denial of Request for Commitment. — Since the fact that the defendant was indigent was irrelevant to the applicability of this section, there was no equal protection issue presented where the trial court denied the defendant's request for a commitment and psychiatric examination to determine his capacity to stand trial. *State v. Woods*, 293 N.C. 58, 235 S.E.2d 47 (1977).

Order Declaring Defendant Incapacitated as Evidence at Subsequent Trial. — An order entered by a trial judge declaring defendant mentally incapacitated and unable to proceed to trial was some evidence of defendant's mental condition and was admissible at trial on the question of his insanity. When such evidence is admitted, the trial judge should clearly instruct the jury that this evidence is not conclusive but is merely another circumstance to be considered by the jury in reaching its decision. *State v. Bundridge*, 294 N.C. 45, 239 S.E.2d 811 (1978), decided under repealed § 122-84.

ARTICLE 57.

*Pleas.***§ 15A-1012. Aid of counsel; time for deliberation.**

Cited in *State v. Sanders*, 294 N.C. 337, 240 S.E.2d 788 (1978).

ARTICLE 58.

*Procedures Relating to Guilty Pleas in Superior Court.***§ 15A-1021. Plea conference; improper pressure prohibited; submission of arrangement to judge; restitution and reparation as part of plea arrangement agreement, etc.**

(d) When restitution or reparation by the defendant is a part of the plea arrangement agreement, if the judge concurs in the proposed disposition he may order that restitution or reparation be made as a condition of special probation pursuant to the provisions of G.S. 15A-1351, or probation pursuant to the provisions of G.S. 15A-1343(d). If an active sentence is imposed the court may order that the defendant make restitution or reparation out of any earnings gained by the defendant if he attains work release privileges under the provisions of G.S. 148-33.1, or that restitution or reparation be imposed as a condition of parole in accordance with the provisions of G.S. 148-57.1. The order providing for restitution or reparation shall be in accordance with the applicable provisions of G.S. 15A-1343(d).

When restitution or reparation is ordered as a part of a plea arrangement or a condition of parole or work release privileges, the sentencing court shall enter as a part of the commitment that restitution or reparation is ordered as a part of a plea arrangement. The Administrative Office of the Courts shall prepare and distribute forms which provide for ample space to make restitution or reparation orders incident to commitments. (1973, c. 1286, s. 1; 1975, c. 117; c. 166, s. 27; 1977, c. 614, ss. 3, 4; 1977, 2nd Sess., c. 1147, s. 1.)

Editor's Note. —

The 1977, 2nd Sess., amendment, effective July 1, 1978, divided subsection (d) into two paragraphs, and, in the first paragraph, inserted "as a condition of special probation" and substituted "15A-1351" for "15-199(10)" and "15A-1343(d)" for "15-197.1" in the first sentence, inserted "probation" following "or" near the end of the first sentence and substituted "15A-1343(d)" for "15-199(10)" at the end of the third sentence. In the second paragraph of subsection (d), the amendment deleted "which forms shall be conveniently structured to enable the sentencing court to make its order" at the end of the paragraph.

As the rest of the section was not changed by the amendment, only subsection (d) is set out.

For article, "Plea Bargaining in North Carolina," see 54 N.C.L. Rev. 823 (1976).

Where a defendant elects not to stand by his portion of a plea agreement, the State is not bound by its agreement to forego the greater charge. State v. Fox, 34 N.C. App. 576, 239 S.E.2d 471 (1977).

Appeal to Superior Court for Trial de Novo. — Where a defendant originally charged with felonies entered guilty pleas to misdemeanors in the district court pursuant to a plea bargain with the State, but then appealed to the superior court for a trial de novo, the State was not bound by the agreement and could try the defendant upon the felony charges or any lesser included offenses. State v. Fox, 34 N.C. App. 576, 239 S.E.2d 471 (1977).

§ 15A-1025. Plea discussion and arrangement inadmissible.

Editor's Note. —

For survey of 1976 case law on criminal procedure, see 55 N.C.L. Rev. 989 (1977).

ARTICLE 59.

Maintenance of Order in the Courtroom.

§ 15A-1031. Custody and restraint of defendant and witnesses.

Editor's Note. —

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without

regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

ARTICLE 61.

Granting of Immunity to Witnesses.

§ 15A-1052. Grant of immunity in court proceedings.

This section requires the trial judge to inform the jury "of the grant of immunity" and not the details of the grant. State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977).

The legislature intended for the jury to know the witness was receiving something of value in exchange for his testimony which might bear

on his credibility. State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977).

Instruction Need Not Be Given Immediately before Witness's Testimony. — Nothing in this section requires the instruction in subsection (c) to be given immediately before the witness's testimony. The statute only specifies that the

instruction be given "prior" to the testimony. State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977).

Instruction Given before Any Witness Called. — The trial judge's instruction as to the grant of immunity complied with the spirit as well as the letter of the law where it was given before any witnesses were called in the case, but not immediately before the witness testified. State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977).

Jury Should Be Instructed in Final Charge. — Subsection (c) clearly requires the court to

instruct the jury as to the interest of the witness under the grant of immunity but "during the charge to the jury." This language means during the judge's final charge, and not in advance of the witness's testimony. State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977).

Substantial Compliance. — Where the material terms of the grant of immunity are explained to the jury, there is substantial compliance with this section and no prejudicial error. State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977).

§ 15A-1054. Charge reductions or sentence concessions in consideration of truthful testimony.

The remedy for failure to comply with subsection (c) of this section is the granting of a recess upon motion by the defendant, rather

than suppression of the testimony. State v. Lester, 294 N.C. 220, 240 S.E.2d 391 (1978).

ARTICLE 62.

Mistrial.

§ 15A-1601. Mistrial for prejudice to defendant.

Editor's Note. —

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without

regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

SUBCHAPTER XI. TRIAL PROCEDURE IN DISTRICT COURT.

ARTICLE 65.

In General.

§ 15A-1101. Applicability of superior court procedure.

Editor's Note. —

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without

regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

SUBCHAPTER XII. TRIAL PROCEDURE IN SUPERIOR COURT.

ARTICLE 71.

Right to Trial by Jury.

§ 15A-1201. Right to trial by jury.

Editor's Note. —

Session Laws 1977, c. 711, s. 39, as amended

by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall

become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered

against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

ARTICLE 72.

Selecting and Impaneling the Jury.

§ 15A-1211. Selection procedure generally; role of judge; challenge to the panel; authority of judge to excuse jurors.

Editor's Note. —

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without

regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

§ 15A-1214. Selection of jurors; procedure.

Reopening Examination after Impanelment.

— It is well established that, prior to the impaneling of the jury, it is within the discretion of the trial judge to reopen the examination of a juror, previously passed by both the State and the defendant, and to excuse such juror upon

challenge, either peremptory or for cause, and there is no reason for the termination of this discretion in the trial judge at the impanelment of the jury. *State v. Kirkman*, 293 N.C. 447, 238 S.E.2d 456 (1977), decided under repealed § 9-21.

ARTICLE 73.

Criminal Jury Trial in Superior Court.

§ 15A-1221. Order of proceedings in jury trial; reading of indictment prohibited. — (a) The order of a jury trial, in general, is as follows:

- (1) The defendant must be arraigned and must have his plea recorded, out of the presence of the prospective jurors, unless he has waived arraignment under G.S. 15A-945.
- (2) The judge must inform the prospective jurors of the case in accordance with the G.S. 15A-1213.
- (3) The jury must be sworn, selected and impaneled in accordance with Article 72, *Selecting and Impaneling the Jury*.
- (4) Each party must be given the opportunity to make a brief opening statement, but the defendant may reserve his opening statement.
- (5) The State must offer evidence.
- (6) The defendant may offer evidence and, if he has reserved his opening statement, may precede his evidence with that statement.
- (7) The State and the defendant may then offer successive rebuttals as provided in G.S. 15A-1226.
- (8) At the conclusion of the evidence, the parties may make arguments to the jury in accordance with the provisions of G.S. 15A-1230.
- (9) The judge must deliver a charge to the jury in accordance with the provisions of G.S. 15A-1231 and 15A-1232.
- (10) The jury must retire to deliberate, and alternate jurors who have not been seated must be excused as provided in G.S. 15A-1215.

(b) At no time during the selection of the jury or during trial may any person read the indictment to the prospective jurors or to the jury. (1977, c. 711, s. 1; 1977, 2nd Sess., c. 1147, s. 2.)

Editor's Note. —

The 1977, 2nd Sess., amendment, effective July 1, 1978, designated the former provisions of this section as subsection (a) and added subsection (b).

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall

become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

§ 15A-1222. Expression of opinion prohibited.

Editor's Note. — For article discussing North Carolina jury instruction practice, see 52 N.C.L. Rev. 719 (1974).

§ 15A-1232. Jury instructions; explanation of law; opinion prohibited.**I. IN GENERAL.****Editor's Note. —**

For article discussing North Carolina jury

instruction practice, see 52 N.C.L. Rev. 719 (1974).

§ 15A-1236. Admonitions to jurors; regulation and separation of jurors. —

(a) The judge at appropriate times must admonish the jurors that it is their duty:

- (1) Not to talk among themselves about the case except in the jury room after their deliberations have begun;
- (2) Not to talk to anyone else, or to allow anyone else to talk with them or in their presence about the case and that they must report to the judge immediately the attempt of anyone to communicate with them about the case;
- (3) Not to form an opinion about the guilt or innocence of the defendant, or express any opinion about the case until they begin their deliberations;
- (4) To avoid reading, watching, or listening to accounts of the trial; and
- (5) Not to talk during trial to parties, witnesses, or counsel.

The judge may also admonish them with respect to other matters which he considers appropriate.

(1977, 2nd Sess., c. 1147, s. 3.)

Editor's Note. — The 1977, 2nd Sess., amendment, effective July 1, 1978, added "until they begin their deliberations" at the end of subdivision (a)(3).

As the rest of the section was not changed by the amendment, only subsection (a) is set out.

SUBCHAPTER XIII. DISPOSITION OF DEFENDANTS.**ARTICLE 78.***Order of Commitment to Imprisonment.*

§ 15A-1301. Order of commitment to imprisonment when not otherwise specified. — When a judicial official orders that a defendant be imprisoned he must issue an appropriate written commitment order. When the commitment is to a sentence of imprisonment, the commitment must include the identification

of the offense or offenses for which the defendant was convicted and, if the sentences are consecutive, the maximum sentence allowed by law upon conviction of each offense, and, if the sentences are concurrent or consolidated, the longest of the maximum sentences allowed by law upon conviction of any of the offenses. (1977, c. 711, s. 1; 1977, 2nd Sess., c. 1147, s. 4.)

Editor's Note. —

The 1977, 2nd Sess., amendment, effective Aug. 1, 1978, added the second sentence.

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all

matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

ARTICLE 80.

Defendants Found Not Guilty by Reason of Insanity.

§ 15A-1321. Civil commitment of defendants found not guilty by reason of insanity.

Editor's Note. —

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons

sentenced before July 1, 1978."

Instruction Required upon Request of Defendant Interposing Insanity Defense. — Upon request, a defendant who interposed a defense of insanity to a criminal charge was entitled to a jury instruction by the trial judge setting out in substance the commitment procedures outlined in repealed § 122-84.1. State v. Bundridge, 294 N.C. 45, 239 S.E.2d 811 (1978).

ARTICLE 81.

General Sentencing Provisions.

§ 15A-1331. Authorized sentences; conviction.

Editor's Note. —

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without

regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

§ 15A-1332. Presentence reports.

In sentencing, the trial court is not confined to the evidence relating to the offense charged. It may inquire into such matters as age, character, education, environment, habits, mentality, propensities and record of the person

about to be sentenced. And the court may inquire into alleged acts of misconduct in prison. State v. Locklear, 34 N.C. App. 37, 237 S.E.2d 289, cert. denied, 293 N.C. 591, 238 S.E.2d 150 (1977), decided under former § 15-198.

§ 15A-1334. The sentencing hearing.

But Sentencing Hearing Must Be Fair and Just. — It would be unreasonable to require that all information in a presentence report be free

of hearsay. Nor should the formal rules of evidence apply to the testimony of witnesses in a sentencing hearing. But the sentencing

hearing must be fair and just, and the trial court must provide the defendant with full opportunity to controvert hearsay and other representations in aggravation of punishment. *State v. Locklear*, 34 N.C. App. 37, 237 S.E.2d 289, cert. denied, 293 N.C. 591, 238 S.E.2d 150 (1977), decided under former § 15-198.

Different evidentiary rules govern trial and sentencing procedures. *State v. Locklear*, 34

N.C. App. 37, 237 S.E.2d 289, cert. denied, 293 N.C. 591, 238 S.E.2d 150 (1977), decided under former § 15-198.

The trial judge should not base his sentence solely on "unsolicited whispered representations" or "rank hearsay." *State v. Locklear*, 34 N.C. App. 37, 237 S.E.2d 289, cert. denied, 293 N.C. 591, 238 S.E.2d 150 (1977), decided under former § 15-198.

ARTICLE 82.

Probation.

§ 15A-1341. Probation generally. — (a) Use of Probation. — A person who has been convicted of any noncapital criminal offense not punishable by a minimum term of life imprisonment or a minimum term without benefit of probation may be placed on probation as provided by this Article.

(b) Supervised and Unsupervised Probation. — The court may place a person on supervised or unsupervised probation. A person on unsupervised probation is subject to all incidents of probation except supervision by or assignment to a probation officer.

(1977, 2nd Sess., c. 1147, ss. 4A, 5.)

Editor's Note. —

The 1977, 2nd Sess., amendment, effective July 1, 1978, inserted "or a minimum term without benefit of probation" and substituted "by" for "in" preceding "this Article" in subsection (a) and inserted "or assignment to" in the second sentence of subsection (b).

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall

become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

As subsection (c) was not changed by the amendment, it is not set out.

§ 15A-1342. Incidents of probation.

(d) Mandatory Review of Probation. — Each probation officer must bring the cases of each probationer assigned to him before a court with jurisdiction to review the probation when the probationer has served three years of a probationary period greater than three years. The probation officer must give reasonable notice to the probationer, and the probationer may appear. The court must review the case file of a probationer so brought before it and determine whether to terminate his probation.

(e) Out-of-State Supervision. — Supervised probationers are subject to out-of-State supervision under the provisions of G.S. 148-65.1.

(1977, 2nd Sess., c. 1147, ss. 6,7.)

Editor's Note. — The 1977, 2nd Sess., amendment, effective July 1, 1978, substituted "the cases of each probationer" for "all probationers" in the first sentence and added the second sentence of subsection (d) and added

"Supervised" at the beginning of subsection (e).

As the rest of the section was not changed by the amendment, only subsections (d) and (e) are set out.

§ 15A-1343. Conditions of probation.

(b) Appropriate Conditions. — When placing a defendant on probation, the court may, as a condition of the probation, require that during the period of

probation the defendant comply with one or more of the following conditions:

- (1) Not commit any criminal offense.
 - (2) Work faithfully at suitable employment or faithfully pursue a course of study or of vocational training that will equip him for suitable employment.
 - (3) Undergo available medical or psychiatric treatment and remain in a specified institution if required for that purpose.
 - (4) Attend or reside in a facility providing rehabilitation, instruction, recreation, or residence for persons on probation.
 - (5) Support his dependents and meet other family responsibilities.
 - (6) Make restitution or reparation as provided in subsection (d).
 - (7) Pay a fine authorized by Article 84, Fines.
 - (8) Refrain from possessing a firearm or destructive device or other dangerous weapon unless granted written permission by the court or the probation officer.
 - (9) Report to a probation officer at reasonable times and in a reasonable manner, as directed by the court or the probation officer.
 - (10) Permit the probation officer to visit him at reasonable times at his home or elsewhere.
 - (11) Remain within the jurisdiction of the court, unless granted permission to leave by the court or the probation officer.
 - (12) Answer all reasonable inquiries by the probation officer and obtain prior approval from the probation officer for any change in address or employment.
 - (13) Promptly notify the probation officer of any change in address or employment.
 - (14) Pay court costs and costs for appointed counsel or public defender to represent him in the case in which he was convicted.
 - (15) Submit at reasonable times to warrantless searches by a probation officer of his person, and of his vehicle and premises while he is present, for purposes reasonably related to his probation supervision. The court may not require as a condition of probation that the probationer submit to any other search that would otherwise be unlawful.
 - (16) Submit to imprisonment required for special probation under G.S. 15A-1351(a) or G.S. 15A-1344(e).
 - (16a) Within the first 30 days of his probation, visit, with his probation officer, a prison unit maintained by the Department of Correction for a tour thereof so that he may better appreciate the consequences of probation revocation.
 - (17) Satisfy any other conditions reasonably related to his rehabilitation.
- (d) Restitution as a Condition of Probation. — As a condition of probation, a defendant may be required to make restitution or reparation to an aggrieved party or parties who shall be named by the court for the damage or loss caused by the defendant arising out of the offense or offenses for which the defendant has been convicted. When restitution or reparation is a condition imposed, the court shall take into consideration the resources of the defendant, his ability to earn, his obligation to support dependents, and such other matters as shall pertain to his ability to make restitution or reparation. The amount must be limited to that supported by the record, and the court may order partial restitution or reparation when it appears that the damage or loss caused by the offense or offenses is greater than that which the defendant is able to pay. The court shall fix the manner of performing the restitution or reparation, and in doing so, the court may take into consideration the recommendation of the probation officer. An order providing for restitution or reparation shall in no way abridge the right of any aggrieved party to bring a civil action against the defendant for money damages arising out of the offense or offenses committed

by the defendant, but any amount paid by the defendant under the terms of an order as provided herein shall be credited against any judgment rendered against the defendant in such civil action. As used herein, "restitution" shall mean compensation for damage or loss as could ordinarily be recovered by an aggrieved party in a civil action. As used herein, "reparation" shall include but not be limited to the performing of community services, volunteer work, or doing such other acts or things as shall aid the defendant in his rehabilitation. As used herein, "aggrieved party" shall include individuals, firms, corporations, associations or other organizations, and government agencies, whether federal, State or local. Provided, that no government agency shall benefit by way of restitution or reparation except for particular damage or loss to it over and above its normal operating costs. Provided further, that no third party shall benefit by way of restitution or reparation as a result of the liability of that third party to pay indemnity to an aggrieved party for the damage or loss caused by the defendant. Restitution or reparation measures are ancillary remedies to promote rehabilitation of criminal offenders and to provide for compensation to victims of crime, and shall not be construed to be a fine or other punishment as provided for in the Constitution and laws of this State. (1977, c. 711, s. 1; 1977, 2nd Sess., c. 1147, ss. 8-10.)

Editor's Note. —
The 1977, 2nd Sess., amendment, effective July 1, 1978, rewrote subdivision (6) of subsection (b), added subdivision (16a) to

subsection (b) and added subsection (d).
As the rest of the section was not changed by the amendment, only subsections (b) and (d) are set out.

§ 15A-1344. Response to violations; alteration and revocation. — (a) Authority to Alter or Revoke. — Except as provided in subsection (b), probation may be reduced, terminated, continued, extended, modified, or revoked by any judge entitled to sit in the court which imposed probation and who is resident or presiding in the district where the sentence of probation was imposed, where the probationer violates probation, or where the probationer resides. The district attorney of the district in which probation was imposed must be given reasonable notice of any hearing to affect probation substantially.

(d) Extension and Modification; Response to Violations. — At any time prior to the expiration or termination of the probation period, the court may after notice and hearing and for good cause shown extend the period of probation up to the maximum allowed under G.S. 15A-1342(a) and may modify the conditions of probation. The hearing may be held in the absence of the defendant, if he fails to appear for the hearing after a reasonable effort to notify him. If a defendant violates a condition of probation at any time prior to the expiration or termination of the period of probation, the court, in accordance with the provisions of G.S. 15A-1345, may continue him on probation, with or without modifying the conditions, may place the defendant on special probation as provided in subsection (e), or, if continuation, modification, or special probation is not appropriate, may revoke the probation and activate the suspended sentence imposed at the time of initial sentencing; provided that probation may not be revoked solely for conviction of a misdemeanor unless it is punishable by imprisonment for more than 30 days. The court, before activating a sentence to imprisonment established when the defendant was placed on probation, may reduce the sentence. A sentence activated upon revocation of probation commences on the day probation is revoked and runs concurrently with any other period of probation, parole, or imprisonment to which the defendant is subject during that period unless the revoking judge specifies that it is to run consecutively with the other period.

(e) Special Probation in Response to Violation. — When a defendant has violated a condition of probation, the court may modify his probation to place

him on special probation as provided in this subsection. In placing him on special probation, the court may continue or modify the conditions of his probation and in addition require that he submit to a period or periods of imprisonment, either continuous or noncontinuous, at whatever time or intervals within the period of probation the court determines. If imprisonment is for continuous periods, the confinement may be in either the custody of the Department of Correction or a local confinement facility. Noncontinuous periods of imprisonment under special probation may only be served in a designated local confinement or treatment facility. The total of all periods of confinement imposed as an incident of special probation, but not including an activated suspended sentence, may not exceed six months or one fourth the maximum penalty allowed by law for the offense, whichever is less. No confinement other than an activated suspended sentence may be required beyond the period of probation or beyond two years of the time the special probation is imposed, whichever comes first.

(1977, 2nd Sess., c. 1147, ss. 11, 11A, 13A.)

Editor's Note. — The 1977, 2nd Sess., amendment, effective July 1, 1978, substituted "of any hearing to affect probation substantially" for "if the hearing is to be held in any other district" at the end of subsection (a), added the proviso to the third sentence of

subsection (d) and substituted "continuous" for "consecutive" and "noncontinuous" for "nonconsecutive" throughout subsection (e).

As the rest of the section was not changed by the amendment, only subsections (a), (d) and (e) are set out.

§ 15A-1345. Arrest and hearing on probation violation. — (a) Arrest for Violation of Probation. — A probationer is subject to arrest for violation of conditions of probation by a law-enforcement officer or probation officer upon either an order for arrest issued by the court or upon the written request of a probation officer, accompanied by a written statement signed by the probation officer that the probationer has violated specified conditions of his probation. However, a probation revocation hearing under subsection (e) may be held without first arresting the probationer.

(d) Procedure for Preliminary Hearing on Probation Violation. — The preliminary hearing on probation violation must be conducted by a judge who is sitting in the county where the probationer was arrested or where the alleged violation occurred. If no judge is sitting in the county where the hearing would otherwise be held, the hearing may be held anywhere in the judicial district. The State must give the probationer notice of the hearing and its purpose, including a statement of the violations alleged. At the hearing the probationer may appear and speak in his own behalf, may present relevant information, and may, on request, personally question adverse informants unless the court finds good cause for not allowing confrontation. Formal rules of evidence do not apply at the hearing. If probable cause is found or if the probable cause hearing is waived, the probationer may be held for a revocation hearing, subject to release under the provisions of subsection (b). If the hearing is held and probable cause is not found, the probationer must be released to continue on probation.

(1977, 2nd Sess., c. 1147, ss. 12, 13.)

Editor's Note. —

The 1977, 2nd Sess., amendment, effective July 1, 1978, inserted "by a law-enforcement officer or probation officer" in the first sentence of subsection (a) and substituted "the alleged violation occurred" for "probation was imposed" at the end of the first sentence of subsection (d).

As the rest of the section was not changed by

the amendment, only subsections (a) and (d) are set out.

Sufficient Notice of Intent to Pray Revocation of Sentence Suspension. — Defendant was given sufficient notice of the State's intent to pray revocation of the suspension of his sentence for abandonment and nonsupport of his wife and children, where the

warrant providing the basis for the revocation hearing stated that the defendant had failed to comply with a support order and was in arrears in the amount of \$690. *State v. Hodges*, 34 N.C. App. 183, 237 S.E.2d 576 (1977), decided under former § 15-200.1.

§ 15A-1347. Appeal from revocation of probation or imposition of special probation upon violation. — When a district court judge, as a result of a finding of a violation of probation, activates a sentence or imposes special probation, the defendant may appeal to the superior court for a de novo revocation hearing. At the hearing the probationer has all rights and the court has all authority they have in a revocation hearing held before the superior court in the first instance. Appeals from lower courts to the superior courts from judgments revoking probation may be heard in term or out of term, in the county or out of the county by the resident superior court judge of the district or the superior court judge assigned to hold the courts of the district, or a judge of the superior court commissioned to hold court in the district, or a special superior court judge residing in the district. When the defendant appeals to the superior court because a district court has found he violated probation and has activated his sentence or imposed special probation, and the superior court, after a de novo revocation hearing, orders that the defendant continue on probation under the same or modified conditions, the superior court is considered the court that originally imposed probation with regard to future revocation proceedings and other purposes of this Article. When a superior court judge, as a result of a finding of a violation of probation, activates a sentence or imposes special probation, either in the first instance or upon a de novo hearing after appeal from a district court, the defendant may appeal under G.S. 7A-27. (1977, c. 711, s. 1; 1977, 2nd Sess., c. 1147, s. 14.)

Editor's Note. —

The 1977, 2nd Sess., amendment, effective July 1, 1978, added the fourth sentence.

ARTICLE 83.

Imprisonment.

§ 15A-1351. Sentence of imprisonment; incidents; special probation. — (a) The judge may sentence a defendant convicted of an offense for which the maximum penalty does not exceed 10 years to special probation. Under a sentence of special probation, the court may suspend the term of imprisonment and place the defendant on probation as provided in Article 82, Probation, and in addition require that the defendant submit to a period or periods of imprisonment in the custody of the Department of Correction or a designated local confinement or treatment facility at whatever time or intervals within the period of probation, consecutive or nonconsecutive, the court determines. If imprisonment is for continuous periods, the confinement may be in the custody of either the Department of Correction or a local confinement facility. Noncontinuous periods of imprisonment under special probation may only be served in a designated local confinement or treatment facility. The total of all periods of confinement imposed as an incident of special probation, but not including an activated suspended sentence, may not exceed six months or one fourth the maximum penalty allowed by law for the offense, whichever is less, and no confinement other than an activated suspended sentence may be required beyond two years of conviction. In imposing a sentence of special probation, the judge may credit any time spent committed or confined, as a result of the charge, to either the suspended sentence or to the imprisonment required for special probation. The period of probation, including the period of imprisonment required for special probation, may not exceed five years. The court may revoke,

modify, or terminate special probation as otherwise provided for probationary sentences.

(e) **Youthful Offenders.** — If an offender is under the age of 21 years at the time of conviction, the court may sentence the offender as a youthful offender under the provisions of Article 3B of Chapter 148 of the General Statutes.

(g) **Credit.** — Credit towards a sentence to imprisonment is as provided in Article 19A of Chapter 15 of the General Statutes. (1977, c. 711, s. 1; 1977, 2nd Sess., c. 1147, ss. 15-17.)

Editor's Note. —

The 1977, 2nd Sess., amendment, effective July 1, 1978, added the third and fourth sentences of subsection (a), substituted "Article 3B" for "Article 3A" in subsection (e) and added subsection (g).

As the rest of the section was not changed by the amendment, only subsections (a), (e) and (g) are set out.

Session Laws 1977, c. 711, s. 39, as amended

by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

§ 15A-1352. Commitment to Department of Correction or local confinement facility. — A person sentenced to imprisonment for a felony or a misdemeanor under this Article or for nonpayment of a fine under Article 84, Fines, must be committed for the term designated by the court to the custody of the Department of Correction or to a local confinement facility. If the sentence imposed is for a period of 180 days or less, the commitment must be to a facility other than one maintained by the Department of Correction, except as provided in G.S. 148-32.1(b). (1977, c. 711, s. 1; 1977, 2nd Sess., c. 1147, s. 18.)

Editor's Note. — The 1977, 2nd Sess., amendment, effective July 1, 1978, substituted "of 180 days or less" for "less than 180 days"

in the second sentence and added at the end of that sentence "except as provided in G.S. 148-32.1(b)."

§ 15A-1355. Calculation of terms of imprisonment.

(b) Repealed by Session Laws 1977, 2nd Sess., c. 1147, s. 19, effective July 1, 1978.

(1977, 2nd Sess., c. 1147, s. 19.)

Editor's Note. — The 1977, 2nd Sess., amendment, effective July 1, 1978, repealed subsection (b), relating to credit for time spent committed to or in confinement in correctional,

mental or other institutions and for time spent in confinement in another jurisdiction.

As the other subsections were not changed by the amendment, they are not set out.

ARTICLE 84.

Fines.

§ 15A-1361. Authorized fines.

Editor's Note. —

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without

regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

ARTICLE 85.

*Parole.***§ 15A-1371. Parole eligibility, consideration, and refusal.** — (a) Eligibility.

— Unless his sentence includes a minimum sentence, a prisoner serving a term other than one included in a sentence of special probation imposed under authority of this Subchapter is eligible for release on parole at any time. A prisoner whose sentence includes a minimum term of imprisonment imposed under authority of this Subchapter is eligible for release on parole only upon completion of the service of that minimum term or one fifth of the maximum penalty allowed by law for the offense for which the prisoner is sentenced, whichever is less, less any credit allowed under G.S. 15A-1355(c) and Article 19A of Chapter 15 of the General Statutes. Under this section, when the maximum allowed by law for the offense is life imprisonment, one fifth of the maximum is calculated as 20 years. A prisoner whose sentence includes a minimum sentence identical to a minimum sentence required by law is eligible for release on parole upon completion of one fourth of the minimum time, unless the order of commitment indicates that the minimum sentence was not imposed solely because required by law.

(b) Consideration for Parole. — The Parole Commission must consider the desirability of parole for each person sentenced for a maximum term of 18 months or longer:

- (1) Within the period of 90 days prior to his eligibility for parole, if he is ineligible for parole until he has served more than a year; or
- (2) Within the period of 90 days prior to the expiration of the first year of the sentence, if he is eligible for parole at any time. Whenever the Parole Commission will be considering for parole a prisoner who, if released, would have served less than half of the maximum term of his sentence, the Commission must notify the prisoner and the district attorney of the district where the prisoner was convicted at least 30 days in advance of considering the parole. If the district attorney makes a written request in such cases, the Commission must publicly conduct its consideration of parole. Following its consideration, the Commission must give the prisoner written notice of its decision. If parole is denied, the Commission must consider its decision while the prisoner is eligible for parole at least once a year until parole is granted and must give the prisoner written notice of its decision at least once a year.

(g) Automatic Parole in Absence of Finding. — A prisoner eligible for parole under subsection (a) and serving a maximum sentence of not less than six months for a misdemeanor or serving a sentence not less than six months nor as great as 18 months for a felony must be released on parole when he completes service of one third of his maximum sentence unless the Parole Commission finds in writing that:

- (1) There is a substantial risk that he will not conform to reasonable conditions of parole; or
- (2) His release at that time would unduly depreciate the seriousness of his crime or promote disrespect for law; or
- (3) His continued correctional treatment, medical care, or vocational or other training in the institution will substantially enhance his capacity to lead a law-abiding life if he is released at a later date; or
- (4) There is a substantial risk that he would engage in further criminal conduct.

If a prisoner is released on parole by operation of this subsection, the term of parole is the unserved portion of the sentence to imprisonment, and the conditions of parole, unless otherwise specified by the Parole Commission, are those authorized in G.S. 15A-1374(b)(4) through (10). (1977, c. 711, s. 1; 1977, 2nd Sess., c. 1147, ss. 19A-22.)

Editor's Note. —

The 1977, 2nd Sess., amendment, effective July 1, 1978, deleted "life imprisonment or" following "other than" in the first sentence of subsection (a), substituted "G.S. 15A-1355(c) and Article 19A of Chapter 15 of the General Statutes" for "G.S. 15A-1355(b) and (c)" at the end of the second sentence of subsection (a) and rewrote the last sentence of subsection (a). In subsection (b), the amendment also substituted "Within the period of 90 days" for "at least 60 days" at the beginning of subdivisions (1) and (2), inserted "the prisoner and" preceding "the district attorney" in the second sentence of subdivision (2), and substituted "give the prisoner written notice of its decision" for "issue a formal order granting or denying parole" at the end of the fourth sentence and near the end of the last sentence of subdivision (2). The amendment also inserted "maximum" near the beginning of the introductory language in subsection (g).

Session Laws 1977, c. 711, s. 38, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 31, effective July 1, 1978, provides: "The eligibility for parole and work release of prisoners sentenced before the effective date of this act is determined by the law applicable prior to the effective date of this act."

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

As the rest of the section was not changed by the amendment, only subsections (a), (b) and (g) are set out.

§ 15A-1376. Arrest and hearing on parole violation. — (a) Arrest for Violation of Parole. — A parolee is subject to arrest by a law-enforcement officer or a parole officer for violation of conditions of parole only upon the issuance of an order of temporary or conditional revocation of parole by the Parole Commission. However, a parole revocation hearing under subsection (e) may be held without first arresting the parolee.

(b) When and Where Preliminary Hearing on Parole Violation Required. — Unless the hearing required by subsection (e) is first held or the parolee waives the hearing or a continuance is requested by the parolee, a preliminary hearing on parole violation must be held reasonably near the place of the alleged violation or arrest and within seven working days of the arrest of a parolee to determine whether there is probable cause to believe that he violated a condition of parole. Otherwise, the parolee must be released seven working days after his arrest to continue on parole pending a hearing. If the parolee is not within the State, his preliminary hearing is as prescribed by G.S. 148-65.1A.

(d) Procedure for Preliminary Hearing on Parole Violation. — The Department of Correction must give the parolee notice of the preliminary hearing and its purpose, including a statement of the violations alleged. At the hearing, the parolee may appear and speak in his own behalf, may present relevant information, and may, on request, personally question witnesses and adverse informants, unless the hearing officer finds good cause for not allowing confrontation. If the person holding the hearing determines there is probable cause to believe the parolee violated his parole, he must summarize the reasons for his determination and the evidence he relied on. Formal rules of evidence do not apply at the hearing. If probable cause is found, the parolee may be held in the custody of the Department of Correction to serve the appropriate term of imprisonment, subject to the outcome of a revocation hearing under subsection (e).

(e) Revocation Hearing. — Before finally revoking parole, the Parole Commission must, unless the parolee waived the hearing or the time limit, provide a hearing within 45 days of the parolee's reconfinement to determine whether to revoke parole finally. The Parole Commission must adopt regulations governing the hearing and must file and publish them as provided in Article 5 of Chapter 150A of the General Statutes. (1977, c. 711, s. 1; 1977, 2nd Sess., c. 1147, ss. 23-26.)

Editor's Note. —

The 1977, 2nd Sess., amendment, effective July 1, 1978, inserted "by a law-enforcement officer or a parole officer" in the first sentence of subsection (a), inserted "or a continuance is requested by the parolee" near the beginning of the first sentence of subsection (b), substituted "seven" for "four" near the middle of the first sentence and in the second sentence and added

the last sentence of subsection (b), substituted "hearing officer" for "court" near the end of the second sentence in subsection (d), and substituted the present second sentence of subsection (e) for provisions to the effect that the hearing should be governed by Article 3 of Chapter 150A, with certain exceptions.

As subsection (c) was not changed by the amendment, it is not set out.

§ 15A-1377: Repealed by Session Laws 1977, 2nd Sess., c. 1147, s. 27, effective July 1, 1978.

SUBCHAPTER XIV. CORRECTION OF ERRORS AND APPEAL.

ARTICLE 88.

Post-Trial Motions and Appeal.

§ 15A-1401. Post-trial motions and appeal.

Editor's Note. —

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without

regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

ARTICLE 89.

Motion for Appropriate Relief and Other Post-Trial Relief.

§ 15A-1411. Motion for appropriate relief.

Editor's Note. —

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without

regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

§ 15A-1414. Motion by defendant for appropriate relief made within 10 days after verdict.

Cited in *State v. Johnson*, 34 N.C. App. 328, 238 S.E.2d 313 (1977).

§ 15A-1415. Grounds for appropriate relief which may be asserted by defendant after verdict and without limitation as to time.

Collateral Attack on Guilty Plea. — An adjudication by a trial judge that a plea of guilty was voluntarily made did not bar a criminal defendant from collaterally attacking that plea

in a post-conviction hearing. *Edmondson v. State*, 33 N.C. App. 746, 236 S.E.2d 397 (1977), decided under former Article 22 of Chapter 15.

ARTICLE 90.

*Appeals from Magistrates and District Court Judges.***§ 15A-1431. Appeals by defendant from magistrate and district court judge; trial de novo.****Editor's Note. —**

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without

regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

ARTICLE 91.

*Appeal to Appellate Division.***§ 15A-1441. Correction of errors by appellate division.****Editor's Note. —**

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without

regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

§ 15A-1444. When defendant may appeal; certiorari.

Application of Former Statute to Certiorari to Review Judgment in Habeas Corpus. — By analogy, § 7A-27(a), former § 15-180.2 and App. R. 21(b) were logically applicable to petitions for certiorari to review judgments in habeas corpus

proceedings involving the restraint of prisoners under sentences of death or life imprisonment. *State v. Niccum*, 293 N.C. 276, 238 S.E.2d 141 (1977).

§ 15A-1446. Requisites for preserving the right to appellate review.

(d) Errors based upon any of the following grounds, which are asserted to have occurred, may be the subject of appellate review even though no objection, exception or motion has been made in the trial division.

- (1) Lack of jurisdiction of the trial court over the offense of which the defendant was convicted.
- (2) Lack of jurisdiction of the trial court over the person of the defendant.
- (3) The criminal pleading charged acts which, at the time they were committed, did not constitute a violation of criminal law.
- (4) The pleading fails to state essential elements of an alleged violation, as required by G.S. 15A-924(a)(5).
- (5) The evidence was insufficient as a matter of law.
- (6) The defendant was convicted under a statute that is in violation of the Constitution of the United States or the Constitution of North Carolina.
- (7) Repealed by Session Laws 1977, 2nd Sess., c. 1147, s. 28.
- (8) The conduct for which the defendant was prosecuted was protected by the Constitution of the United States or the Constitution of North Carolina.
- (9) Subsequent admission of evidence from a witness when there has been an improperly overruled objection to the admission of evidence on the ground that the witness is for a specified reason incompetent or not qualified or disqualified.

- (10) Subsequent admission of evidence involving a specified line of questioning when there has been an improperly overruled objection to the admission of evidence involving that line of questioning.
- (11) Questions propounded to a witness by the court or a juror.
- (12) Rulings and orders of the court, not directed to the admissibility of evidence during trial, when there has been no opportunity to make an objection or motion.
- (13) Error of law in the charge to the jury.
- (14) The court has expressed to the jury an opinion as to whether a fact is fully or sufficiently proved.
- (15) The defendant was not present at any proceeding at which his presence was required.
- (16) Error occurred in the entry of the plea.
- (17) The form of the verdict was erroneous.
- (18) The sentence imposed was unauthorized at the time imposed, exceeded the maximum authorized by law, was illegally imposed, or is otherwise invalid as a matter of law.
- (19) A significant change in law, either substantive or procedural, applies to the proceedings leading to the defendant's conviction or sentence, and retroactive application of the changed legal standard is required. (1977, c. 711, s. 1; 1977, 2nd Sess., c. 1147, s. 28.)

Editor's Note. — The 1977, 2nd Sess., amendment, effective July 1, 1978, repealed subdivision (7) of subsection (d), which read: "The conviction was obtained in violation of the

Constitution of the United States or the Constitution of North Carolina."

As the rest of the section was not changed by the amendment, only subsection (d) is set out.

§ 15A-1448. Procedures for taking appeal. — (a) Time for Entry of Appeal; Jurisdiction over the Case. —

- (1) A case remains open for the taking of an appeal to the appellate division for a period of 10 days after the entry of judgment.
- (2) When a motion for appropriate relief is made during the 10-day period, the case remains open for the taking of an appeal until the expiration of 10 days after the court has ruled on the motion.
- (3) The jurisdiction of the trial court with regard to the case is divested, except as to actions authorized by G.S. 15A-1453, when notice of appeal has been given and the period described in (1) and (2) has expired.
- (4) If there has been no ruling by the trial judge on a motion for appropriate relief within 10 days after motion for such relief has been made, the motion shall be deemed denied.
- (5) The right to appeal is not waived by withdrawal of an appeal if the appeal is reentered within the time specified in (1) and (2).
- (6) The right to appeal is not waived by compliance with all or a portion of the judgment imposed. If the defendant appeals, the court may enter appropriate orders remitting any fines or costs which have been paid. The court may delay the remission pending the determination of the appeal.

(1977, 2nd Sess., c. 1147, s. 29.)

Editor's Note. — The 1977, 2nd Sess., amendment, effective July 1, 1978, rewrote subdivisions (3) and (4) of subsection (a).

As the rest of the section was not changed by the amendment, only subsection (a) is set out.

SUBCHAPTER XV. CAPITAL PUNISHMENT.

ARTICLE 100.

Capital Punishment.

§ 15A-2000. Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.

Stated in *State v. Niccum*, 293 N.C. 276, 238 S.E.2d 141 (1977).

Chapter 17.

Habeas Corpus.

ARTICLE 6.

Proceedings and Judgment.

§ 17-32. Proceedings on return; facts examined; summary hearing of issues.

Cited in *State v. Niccum*, 293 N.C. 276, 238 S.E.2d 141 (1977).

Chapter 18A.

Regulation of Intoxicating Liquors.

Article 1.

General Provisions.

Sec.

18A-2. Definitions.

18A-8. Sale to or purchase by minors.

18A-13. [Repealed.]

Article 2.

A.B.C. Boards and Enforcement.

Part 1. A.B.C. Boards.

18A-15. Powers and authority of State Board.

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Sale, Consumption, Possession and Transportation of Alcoholic Beverages.

18A-25. Prohibited sales.

18A-29. Commercial transportation of spirituous liquors.

18A-29.1. Transportation of alcoholic beverages by holder of mixed beverages permit.

18A-30. Possession and consumption of alcoholic beverages at designated places.

Sec.

18A-31. Permits for social establishments, restaurants, etc.

Article 4.

Malt Beverages and Wine.

Part 2. Permits.

18A-40. Permits prohibited.

Article 5.

Elections.

Part 1. A.B.C. Store Elections.

18A-51. County elections as to alcoholic beverage control stores and sale of mixed beverages.

Article 6.

Miscellaneous Provisions.

18A-54. Power of Governor to prohibit all sales during an emergency.

ARTICLE 1.

General Provisions.

§ 18A-2. **Definitions.** — When used in this Chapter:

- (6) The term "mixed beverage" means a drink composed in whole or in part of alcoholic beverage and served to an individual in a quantity less than the quantity contained in a closed package, purchased for consumption on premises licensed for mixed beverages by the State Board of Alcoholic Control.

(1977, 2nd Sess., c. 1138, s. 1.)

Editor's Note. —

The 1977, 2nd Sess., amendment, effective July 1, 1977, in subdivision (6), substituted "means" for "as used in this Chapter is defined" and "beverage" for "beverages having an alcoholic content of more than fourteen percent of alcohol by volume" near the beginning of the

subdivision and deleted "in a miniature bottle or" following "individual."

Session Laws 1977, 2nd Sess., c. 1138, s. 17, contains a severability clause.

As the rest of the section was not changed by the amendment, only the introductory language and subdivision (6) are set out.

§ 18A-8. **Sale to or purchase by minors.** — (a) It shall be unlawful for:

- (1) Any person, firm, or corporation knowingly to sell or give any malt beverages or unfortified wine to any person under 18 years of age;
- (2) Any person under 18 years of age to purchase or possess, or for anyone to aid or abet such person in purchasing, any malt beverages or unfortified wine;
- (3) Any person, firm, or corporation knowingly to sell or give any alcoholic beverages or mixed beverages to any person under 21 years of age; or
- (4) Any person under 21 years of age to purchase or possess, or for anyone to aid or abet such a person in purchasing, any alcoholic beverages or mixed beverages.

(1977, 2nd Sess., c. 1138, s. 2.)

Editor's Note. — The 1977, 2nd Sess., amendment, effective July 1, 1977, inserted "or mixed beverages" in subdivision (a)(3) and added "or mixed beverages" at the end of subdivision (a) (4).

Session Laws 1977, 2nd Sess., c. 1138, s. 17, contains a severability clause.

As subsection (b) was not changed by the amendment, it is not set out.

§ 18A-13: Repealed by Session Laws 1977, 2nd Sess., c. 1138, s. 19, effective July 1, 1977.

Cross Reference. — For present provisions as to mixed beverage permits, see §§ 18A-30, 18A-31.

ARTICLE 2.

A.B.C. Boards and Enforcement.

Part 1. A.B.C. Boards.

§ 18A-15. Powers and authority of State Board. — The State Board of Alcoholic Control shall have power and authority as follows:

- (1) In conjunction with the Alcohol Law Enforcement Division of the Department of Crime and Control and Public Safety, to see that all the laws relating to the sale and control of intoxicating liquor are observed and performed.
- (2) To audit and examine the accounts, records, books, and papers relating to the operation of county and municipal stores or to have the same audited.
- (3)
 - a. To fix the retail price of each bottle of alcoholic beverages sold in the county and municipal A.B.C. stores at such levels as shall promote the temperate use of these beverages and as may facilitate policing, which price shall be uniform throughout the State;
 - b. To compute the taxes levied by G.S. 105-113.93 and 105-113.94 on the retail prices of spirituous liquors so fixed;
 - c. To add to said retail price:
 1. An amount equal to three and one-half percent (3½%) of said retail price of spirituous liquors; and
 2. One cent (1¢) per bottle on each bottle of alcoholic beverages containing fifty milliliters for less sold in said county and municipal A.B.C. stores and five cents (5¢) per bottle on each bottle of alcoholic beverages containing more than fifty milliliters sold in said stores; the sum of the retail price plus the foregoing additions thereto being the established price for each such bottle of alcoholic beverages. The foregoing additions to retail price shall not be subject to the tax levied by G.S. 105-113.93 and 105-113.94. The clear proceeds of the three and one-half percent (3½%) addition to the retail price of spirituous liquors shall be retained by the respective county or municipal A.B.C. boards in the same manner as other profits derived from the sale of spirituous liquors. The clear proceeds of the one cent (1¢) and five cents (5¢) per bottle addition to retail price shall be remitted to the county commissioners of the county in which such additions to retail price were collected, accompanied by forms or reports to be prescribed

and furnished by the State Board of Alcoholic Control, which remittances shall be spent in the discretion of the county commissioners only for projects for construction, maintenance and operation of facilities for education, research, treatment or rehabilitation of alcoholics. In connection with such projects and programs, the county commissioners, or such agencies as are by them designated, shall also have the authority to use said funds to purchase or lease real and personal property, and to renovate, remodel, furnish and equip buildings as and when required for the operation of such projects and programs. The funds may also be used for programs of education and research on problems of alcoholism and the treatment and rehabilitation of alcoholics. The county commissioners are hereby empowered to spend the funds for a project not located in the county but which benefits the citizens of the county. The Department of Human Resources and the State Department of Public Instruction are hereby empowered to enact guidelines for the expenditure of such funds by county commissioners and the county commissioners may expend the funds pursuant to those guidelines. Reports and remittances of the aforesaid additions to retail price shall be made monthly by the local boards on or before the fifteenth day of the next succeeding month.

3. Ten dollars (\$10.00) on each four liters and a proportional sum on any lesser amount, of spirituous liquor sold to the holder of a mixed beverages permit for the purpose of resale as mixed beverages. This addition to the retail price shall not be subject to the tax levied by G.S. 105-113.93. The clear proceeds from this addition to the retail price of spirituous liquor shall be retained by the respective county or municipal A.B.C. boards in the same manner as other profits derived from the sale of spirituous liquors, except that ten percent (10%) of the proceeds shall be directed to the Department of Human Resources for rehabilitation of alcoholics and research into the causes of alcoholism.
- d. To determine the total prices of all such alcoholic beverages, which total price shall be the sum of the established price plus the taxes levied by G.S. 105-113.93 and 105-113.94, and to notify the stores periodically of such prices.
- (4) To remove any member, or members, of county and municipal boards whenever in the opinion of the State Board such member, or members, of the county or municipal board, or boards, may be unfit to serve thereon.
- (5) To test any and all alcoholic beverages that may be sold, or proposed to be sold, to the county or municipal stores, and to install and operate such apparatus, laboratories, or other means or instrumentalities and employ to operate the same such experts, technicians, employees and laborers as may be necessary to operate the same, in accordance with the opinion of the Board. In lieu of establishing and operating laboratories as above directed, the Board may, with the approval of the Governor and the Commissioner of Agriculture, arrange with the State Chemist to furnish such information and advice and to perform such analyses and other laboratory services as the Board may consider necessary, or they may, if they deem advisable, cause such tests to be made otherwise.
- (6) To supervise purchasing by the county and municipal boards when the

State Board is of the opinion that it is advisable for it to exercise such power in order to carry into effect the purpose and intent of this Chapter, with full power to disapprove any such purchase. At all times it shall have the right to inspect all invoices, papers, books, and records in the county or municipal stores or boards relating to purchases.

- (7) To exercise the power to approve or disapprove in its discretion all regulations adopted by the several county and municipal stores for the operation of said stores and the enforcement of alcoholic beverage control laws which may be in violation of the terms or spirit of this Chapter.
- (8) To require that a sufficient amount be so allocated as to insure adequate enforcement; the amount shall in no instance be less than five percent (5%) nor more than ten percent (10%) of the net profits arising from the sale of alcoholic beverages.
- (9) To remove, in case of violation of the terms or spirit of this Chapter, officers employed, elected, or appointed in the several counties and municipalities where stores may be operated.
- (10) To approve or disapprove, in its discretion, the opening and location of county and municipal stores; provided that in the location of control stores in any county in which a majority of the votes have been cast for liquor control stores, no store or stores shall be located in any community or town in which a majority of the votes cast were against control; provided further, however, that stores may be located in such communities and towns if and when as many as twenty percent (20%) of the qualified voters therein by petition, at any time after 18 months since the last election on such question, have requested the location of such a store or stores in such communities or towns and the State Board has found, upon due investigation after receipt of such petition, that a majority of the qualified electors in such community or town are at the time such investigation is made in favor of establishing such store or stores. Each county and municipality that may be entitled to operate stores for the sale of alcoholic beverages shall be entitled to operate at least one store for such purpose. No additional stores in each of said counties and municipalities shall be opened until and unless their opening and their place of location shall first be approved by the State Board, which at any time may withdraw its approval of the operation of any additional county or municipal store when the store is not operated efficiently and in accordance with the alcoholic beverage control laws and all valid regulations prescribed therefor, or whenever, in the opinion of the State Board, the operation of any county or municipal store shall be inimical to the morals or welfare of the community in which it is operated or for such other cause, or causes, as may appear to the State Board sufficient to warrant the closing of any county or municipal store.
- (11) To require the use of a uniform accounting system in the operation of all county and municipal stores hereunder and to provide in said system for the keeping therein and the record of all such information as may, in the opinion of the said State Board, be necessary or useful in its auditing of the affairs of the said county and municipal stores, as well as in the study of such problems and subjects as may be studied by said State Board in the performance of its duties.
- (12) To grant, to refuse to grant, or to revoke permits for any person, firm, or corporation to do business in North Carolina in selling alcoholic beverages to or for the use of any county or municipal store and to provide and to require that such information be furnished by such person, firm, or corporation as a condition precedent to the granting

of such permit, or permits, and to require the furnishing of such data and information as it may desire during the life of such permit, or permits, and for the purpose of determining whether such permit, or permits, shall be continued, revoked, or regranted after expiration dates. No permit, however, shall be granted by the State Board to any person, firm, or corporation when the State Board has reason sufficient unto itself to believe that such person, firm, or corporation has furnished to it any false or inaccurate information or is not fully, frankly, and honestly cooperating with the State Board, the Alcohol Law Enforcement Division, and the several county and municipal boards in observing and performing all liquor laws that may now or hereafter be in force in this State, or whenever the Board shall be of opinion that such permit ought not to be granted or continued for any cause. Upon the granting of a permit in accordance with this Chapter, the State Board of Alcoholic Control shall notify the county sheriff and county tax collector, and if applicable, the city chief of police and city tax collector, as well as the county alcoholic beverage control officer, whenever an alcoholic beverage control permit of any type is issued within the respective county and/or city.

- (13) On or before June 30, 1975, and thereafter to provide for the receipt, storage and distribution of spirituous liquors by negotiated contract or by use of the procedures for purchase and contract of property by State agencies with a privately owned warehouse in the Raleigh area or, alternatively and by the same procedure, with privately owned warehouses in the several regions of the State which in the discretion of the Board would promote efficient distribution of spirituous liquors to the local boards of alcoholic control and maintain control of such beverages and the Board's supervision thereof. The State Board of Alcoholic Control shall provide for such warehousing and distribution through contracts or subleases with independent contractors, except that the State Board shall have the power and authority to operate such warehouses on an interim emergency or temporary basis pursuant to a change in independent operator or for some condition substantially impeding distribution of spirituous liquors from the warehouse. The Board shall prescribe such rules and regulations as they deem necessary for the receipt, storage and distribution of such beverages and violation of such rules and regulations shall be grounds for termination of a contract upon reasonable notice by the Board. The contract or contracts entered into pursuant to this subdivision shall provide for an annual audited financial statement, shall provide that the records of the warehouse or warehouses be available for inspection at all times by the State Board of Alcoholic Control and the Department of Revenue and shall provide that the accounts of the warehouse or warehouses regarding the receipt, storage and distribution of spirituous liquors be subject to audit by the State Auditor.
- (14) To adopt, amend, or repeal reasonable rules and regulations for the purpose of carrying out the provisions of this Chapter, but not inconsistent herewith, which rules and regulations shall become effective when filed as provided by law.
- (15) To appoint or commission one or more hearing officers who shall have the full authority to make investigations, hold hearings, and make findings of fact. Upon the approval by the State Board of the findings and orders of suspension or revocation of the permit of any licensee made and entered by any such hearing officer, the findings of such hearing officer shall be deemed to be the findings and the order of the Board.

- (16) The Board is authorized to dispose of damaged liquors belonging to the Board by selling it to public or private hospitals to be used only for medicinal purposes, or by sale to military installations or by destroying such liquors as the Board may deem best. Sale shall be by:
- Advertisement for sealed bids;
 - Negotiated offer, advertisement, and upset bids;
 - Public auction; or
 - Exchange.

Complete detailed records of such disposal shall be maintained by the Board showing the brand, amount and disposition. Any funds derived from such liquors shall be paid into the warehouse bailment fund.

- (17) To provide for the storage and transportation of alcoholic beverages for special occasions for a period of 48 hours prior to and following a special occasion by regulation and by the issuance of permits needed for control of such storage and transportation; provided, however, the transportation of alcoholic beverages shall be limited to 20 liters at any one time.
- (18) To adopt rules for the special labeling of containers of alcoholic beverages sold for resale in mixed beverages, and to require the holders of mixed beverages permit to maintain records of alcoholic beverages purchased and sold as mixed beverages and to maintain records of monthly sales of mixed beverages separate from other sales.

The State Board shall have all other powers which may be reasonably implied from the granting of express powers herein named, together with such other powers as may be incidental to, or convenient for, carrying out and performing the powers and duties herein given to the Board. (1937, c. 49, s. 4; cc. 237, 411; 1945, c. 954; 1949, c. 974, s. 9; 1961, c. 956; 1963, c. 426, s. 12; c. 916, s. 2; c. 1119, s. 1; 1965, c. 1063; c. 1102, s. 3; 1967, c. 222, s. 2; c. 1240, s. 1; 1971, c. 872, s. 1; 1973, c. 28; c. 473, s. 1; c. 476, s. 133; c. 606; c. 1288, s. 1; cc. 1369, 1396; 1975, cc. 240, 453, 640; 1977, c. 70, ss. 15.1, 15.2, 16; c. 176, ss. 2, 6; 1977, 2nd Sess., c. 1138, ss. 3, 4, 18.)

Editor's Note. —

Session Laws 1977, 2nd Sess., c. 1138, s. 3, effective July 1, 1977, added paragraph 3 to subdivision (3)c and added subdivision (18).

Session Laws 1977, 2nd Sess., c. 1138, s. 18, effective January 1, 1978 (the effective date of Session Laws 1977, c. 176), amended paragraph 3 of subdivision (3)c by substituting "four liters"

for "gallon" near the beginning of the first sentence.

Session Laws 1977, 2nd Sess., c. 1138, s. 17, contains a severability clause.

Section 105-113.94, referred to in two places in subdivision (3) of this section, was repealed by Session Laws 1975, c. 53, s. 3.

§ 18A-16. County boards of alcoholic control.

Local Modification. —

Camden: 1977, 2nd Sess., c. 1171; Edgecombe: 1977, 2nd Sess., c. 1155.

ARTICLE 3.

Sale, Consumption, Possession and Transportation of Alcoholic Beverages.

§ 18A-25. Prohibited sales.

- (b) The possession for sale, or sales, of any liquor purchased from any county or municipal store, except as authorized by this Chapter, is prohibited. (1937, c. 49, ss. 11, 15; c. 411; 1971, c. 872, s. 1; 1977, 2nd Sess., c. 1138, s. 5.)

Editor's Note. — The 1977, 2nd Sess., amendment, effective July 1, 1977, inserted "except as authorized by this Chapter" and deleted "hereby" preceding "prohibited" in subsection (b).

Session Laws 1977, 2nd Sess., c. 1138, s. 17, contains a severability clause.

As subsection (a) was not changed by the amendment, it is not set out.

§ 18A-29. Commercial transportation of spirituous liquors. — (a) The willful transportation of spirituous liquors within, into, or through the State of North Carolina in quantities in excess of four liters (or 20 liters with a permit) is prohibited except for delivery to federal reservations to which has been ceded exclusive jurisdiction by the State of North Carolina, for delivery to an A.B.C. store or board, for transport through this State to another state, or for delivery to premises holding a mixed beverages permit under the conditions set forth in this Chapter. The State Board of Alcoholic Beverage Control [State Board of Alcoholic Control] may adopt further regulations governing the transportation of spirituous liquors within, into, and through the State of North Carolina for delivery to a federal reservation, A.B.C. stores or boards, or in transit through this State to another state, as it may deem necessary to confine such transportation to legitimate purposes, and may issue transportation permits in accordance with such regulations.

(1977, 2nd Sess., c. 1138, ss. 6, 18.)

Editor's Note. —

Session Laws 1977, 2nd Sess., c. 1138, s. 6, effective July 1, 1977, deleted "or" preceding "for transport" and added "or for delivery to premises holding a mixed beverages permit under the conditions set forth in this Chapter" in the first sentence of subsection (a) as it stood before the amendment in Session Laws 1977, c. 176.

Session Laws 1977, 2nd Sess., c. 1138, s. 18, effective January 1, 1978 (the effective date of

Session Laws 1977, c. 176), amended the first sentence of subsection (a) of this section as amended by Session Laws 1977, 2nd Sess., c. 1138, s. 6, by substituting "four liters" for "one gallon" and "20 liters" for "five gallons" near the beginning of the first sentence.

Session Laws 1977, 2nd Sess., c. 1138, s. 17, contains a severability clause.

As subsections (b) and (c) were not changed by the amendment, they are not set out.

§ 18A-29.1. Transportation of alcoholic beverages by holder of mixed beverages permit. — (a) A person holding a mixed beverages permit, or his designated employee, may purchase, possess, and transport more than four liters of alcoholic beverages in containers not smaller than 750 milliliters if he has in his possession a mixed beverages purchase-transportation permit issued under this section and complies with the provisions of this section and if none of the containers of the alcoholic beverages have had the cap or seal opened or broken.

(b) The mixed beverages purchase-transportation permit may be issued only by the chairman, a member, or the general manager or supervisor of the local alcoholic beverage control board for the county or city within which the premises holding the mixed beverages permit is located, and may authorize the purchase and transportation of alcoholic beverages only within that county or city. The local A.B.C. board may designate a special store within the system to sell alcoholic beverages to be used in mixed beverages.

(c) The purchase-transportation permit shall authorize the holder of the mixed beverages permit, or his designated employee, to purchase and transport the quantity of alcoholic beverages stated on the permit. The following information shall appear on the face of the permit:

- (1) The name and address of the holder of the mixed beverages permit and the registration number of the premises assigned by the state A.B.C. Board;
- (2) The name of the employee authorized to purchase and transport the

alcoholic beverages;

- (3) The name and location of the store where the purchase is to be made;
- (4) The date issued and the expiration date;
- (5) The destination;
- (6) The signature of the persons issuing and receiving the permit;
- (7) A statement that the permit is valid for only one purchase on the date shown and that the permit must accompany the alcoholic beverages during transit and that both the alcoholic beverages and the permit must be displayed to any law-enforcement officer upon request; and
- (8) Such additional information as may be required by the State A.B.C. Board.

In addition, the permit shall include a space for listing the serial number of each case or carton of alcoholic beverages purchased, to be completed at the time of the sale.

(d) The permit shall be valid for only one purchase and shall expire at 9:30 P.M. on the date shown on it. The permit must accompany the alcoholic beverages during transit and both the alcoholic beverages and permit must be displayed to any law-enforcement officer upon request. (1977, 2nd Sess., c. 1138, ss. 7, 18.)

Editor's Note. — Session Laws 1977, 2nd Sess., c. 1138, s. 20, makes this section effective July 1, 1977.

Session Laws 1977, 2nd Sess., c. 1138, s. 18, effective January 1, 1978 (the effective date of Session Laws 1977, c. 176,) amends subsection (a) of this section as enacted by Session Laws

1977, 2nd Sess., c. 1138, s. 7, by substituting "four liters" for "one gallon" and "750 milliliters" for "one-fifth gallon" in subsection (a).

Session Laws 1977, 2nd Sess., c. 1138, s. 17, contains a severability clause.

§ 18A-30. Possession and consumption of alcoholic beverages at designated places. — It shall be lawful in any county or municipality of this State for any person who is at least 21 years of age to possess, for lawful purposes, alcoholic beverages in quantities not in excess of four liters, unless otherwise authorized, provided that these alcoholic beverages are obtained from an authorized alcoholic beverage control store within this State or from a lawful source outside this State, and provided that said alcoholic beverages are possessed for a purpose other than for sale or barter (except where authorized by law), and provided that said alcoholic beverages are purchased, possessed, and consumed in accordance with this and other applicable sections of this Chapter, including the following:

(5) Unlawful Possession or Use. — It shall be unlawful for:

- a. Any person to drink alcoholic beverages or to offer a drink to another person
 - i. On the premises of a county or municipal liquor control store, or
 - ii. Upon any premises used or occupied by a county or municipal alcoholic control board, or
 - iii. On any public road, street, or highway.
- b. Any person to make any public display of alcoholic beverages at any athletic contest.
- c. Any person to possess or consume any alcoholic beverages or mixed beverages upon any of the premises designated under subdivisions (2), (3), (4) or (7) of this section, unless there is conspicuously displayed on the premises a valid permit or notice from the State Board of Alcoholic Control.
- d. Any person, association, or corporation to permit any alcoholic beverages or mixed beverages to be possessed or consumed upon

- any premises not authorized by this Chapter.
- e. Any person to possess or consume any alcoholic beverages or mixed beverages upon any premises where such possession or consumption is not authorized by law, or where the said person has been forbidden to possess or consume alcoholic beverages by the owner, operator, or person in charge of the premises.
 - f. Any person, firm, or corporation to refuse to surrender any permit or notice upon request of the State Board of Alcoholic Control, or falsely to display any such notice, or to display any notice not permitted by the State Board of Alcoholic Control, or to obtain any facsimile permit or notice from any person.
- (6) Hours for Sale and Consumption. — It shall be unlawful for any mixed beverages to be sold on any premises having a mixed beverages permit between the hours of 1:00 A.M. and 7:00 A.M. and it shall be unlawful for any alcoholic beverages or mixed beverages to be consumed on any premises having a permit issued under the provisions of this section between the hours of 1:30 A.M. and 7:00 A.M. However, during the period commencing on the last Sunday of April of each year and ending on the last Sunday of October of each year mixed beverages may be sold until 2:00 A.M. and mixed beverages and alcoholic beverages may be consumed on the premises until 2:30 A.M. Subsequently, on Sundays, sales of mixed beverages and consumption of mixed beverages and alcoholic beverages may not resume until 1:00 P.M.
- (7) Sale of Mixed Beverages. — The State Board of Alcoholic Control may issue a permit allowing the possession of more than four liters of alcoholic beverages and the on-premises sale of mixed beverages by an establishment meeting the requirements of subdivision (2) or (4) of this section, if the sale of mixed beverages has been authorized in the city or county within which the premises is located. If the premises issued the permit for the sale of mixed beverages also has a permit as a social establishment, the provisions of paragraphs c and d of subdivision (2) shall not apply to alcoholic beverages lawfully possessed on the premises for resale as mixed beverages.
- (8) Prohibited Acts of Mixed Beverages Permit Holders. — It shall be unlawful for the holder of a permit for the sale of mixed beverages, or for any servant, agent or employee of the permit holder to:
- a. Refill any alcoholic beverage container with any other intoxicating liquor for use on the licensed premises;
 - b. Transfer from one container to another any special label, seal or device required on containers of alcoholic beverages purchased for resale as mixed beverages;
 - c. Knowingly sell mixed beverages to any person who is intoxicated;
 - d. Sell, offer for sale, or possess for sale on the licensed premises any intoxicating liquor which the premises is not licensed to sell;
 - e. Knowingly permit the possession or consumption on the licensed premises of any intoxicating liquor for which no permit is held if a permit is required by law for the possession or consumption of that intoxicating liquor;
 - f. Sell mixed beverages, or allow mixed beverages to be consumed, on the licensed premises on any day or at any time when such sale or consumption is prohibited by law;
 - g. Allow on the licensed premises any disorderly conduct, breach of peace, or any lewd, immoral or improper entertainment, conduct or practices; or allow on the licensed premises any conduct or entertainment by nude performers or entertainers, or persons wearing transparent clothing, or performances by any male or

female performers simulating sexual acts or sexual activities with any person, object, device or other paraphernalia. (1905, c. 498, ss. 6-8; Rev., ss. 3526, 3534; C. S., s. 3371; 1937, c. 49, ss. 12, 16, 22; c. 411; 1955, c. 999; 1967, c. 222, ss. 1, 8; c. 1256, s. 3; 1969, c. 1018; 1971, c. 872, s. 1; 1973, c. 1226; 1977, c. 176, s. 1; 1977, 2nd Sess., c. 1138, ss. 8-12, 18.)

Editor's Note. —

Session Laws 1977, 2nd Sess., c. 1138, ss. 8-12, effective July 1, 1977, inserted "(except where authorized by law)" in the introductory paragraph, inserted "or mixed beverages" in paragraphs c, d and e of subdivision (5), substituted "subdivisions (2), (3), (4) or (7)" for "subdivisions (2), (3), or (4)" in paragraph c of subdivision 5, inserted "on the premises" following "displayed" and deleted "on said premises" following "notice" near the end of that paragraph, made minor changes in wording in paragraph e of subdivision (5), rewrote subdivision (6), and added subdivisions (7) and (8).

Session Law 1977, 2nd Sess., c. 1138, s. 18, effective January 1, 1978 (the effective date of Session Laws 1977, c. 176), amended subdivision (7) as added to this section by Session Laws 1977, c. 1138, s. 11, by substituting "four liters" for "one gallon" near the beginning of the subdivision.

Session Laws 1977, 2nd Sess., c. 1138, s. 17, contains a severability clause.

As the rest of the section was not changed by the amendment, only the introductory paragraph and subdivisions (5), (6), (7) and (8) are set out.

Stated in *Wheaton v. Hagan*, 435 F. Supp. 1134 (M.D.N.C. 1977).

§ 18A-31. Permits for social establishments, restaurants, etc.

(b) Fees. — Applications for permits shall be accompanied by appropriate fees, payable to the State Board of Alcoholic Control, which shall not be refundable in case a permit is refused, suspended, or revoked. No additional fees or licenses shall be collected by any county or municipality under this section, and the fees received by the State Board of Alcoholic Control shall be deposited with the State Treasurer of North Carolina, as in the case of any other permit fees collected by said Board. No additional charge shall be imposed for any temporary permit. The schedule of fees for the original permit is as follows:

- (1) Two hundred dollars (\$200.00) for a social establishment as defined in G.S. 18A-30(2);
- (2) Two hundred dollars (\$200.00) for a commercial establishment as defined in G.S. 18A-30(3)c;
- (3) One hundred dollars (\$100.00) for a restaurant as defined in G.S. 18A-30(4) having a seating capacity of less than 50;
- (4) Two hundred dollars (\$200.00) for a restaurant as defined in G.S. 18A-30(4) having a seating capacity of 50 or more;
- (5) Three hundred dollars (\$300.00) for any establishment which obtains permits having two or more of the foregoing schedules for the same premises;
- (5a) Twenty-five dollars (\$25.00) for a permit for the possession of alcoholic beverages at a special occasion if the permit is not valid for more than 48 hours;
- (6) Five hundred dollars (\$500.00) for the sale of mixed beverages;
- (7) The annual renewal fees for such permits shall be twenty-five percent (25%) of the original fee herein set forth except that the annual renewal fee for a permit for the sale of mixed beverages shall be fifty percent (50%) of the original fee.

(e) No permit may be issued for the purpose defined in G.S. 18A-30(4) in a county or city in which the sale of mixed beverages is authorized. (1971, c. 872, s. 1; 1977, c. 668, ss. 1, 2; 1977, 2nd Sess., c. 1138, ss. 13, 13.1.)

Editor's Note. —

The 1977, 2nd Sess., amendment, effective

July 1, 1977, added present subdivision (6) of subsection (b) and rewrote former subdivision

(6), which provided for annual renewal fees of twenty-five percent of the original permit, as present subdivision (7), and added subsection (e).
Session Laws 1977, 2nd Sess., c. 1138, s. 17,

contains a severability clause.

As the rest of the section was not changed by the amendment, only subsections (b) and (e) are set out.

ARTICLE 4.

Malt Beverages and Wine.

Part 2. Permits.

§ 18A-40. Permits prohibited.

(c) No retail malt beverage or wine (fortified or unfortified) on-premise permit, or mixed beverage permit, shall be issued for any establishment within 15 meters of a church or a public school unless the State Board of Alcoholic Control determines upon proper investigation and a hearing, if requested, that the establishment is a suitable one and that the failure to issue a permit will result in undue hardship. (1971, c. 872, s. 1; 1977, c. 176, s. 8; 1977, 2nd Sess., c. 1138, s. 14.)

Editor's Note. —

The 1977, 2nd Sess., amendment, effective July 1, 1977, inserted "or mixed beverage permit" near the beginning of subsection (c).

Session Laws 1977, 2nd Sess., c. 1138, s. 17, contains a severability clause.

As subsections (a) and (b) were not changed by the amendment, they are not set out.

ARTICLE 5.

Elections.

Part 1. A.B.C. Store Elections.

§ 18A-51. County elections as to alcoholic beverage control stores and sale of mixed beverages. — (a) No county alcoholic beverage control store shall be established, maintained or operated in any county of this State until and unless there has been held in the county an election as provided herein, and the election shall be held under the same general laws, rules and regulations applicable to elections for county officers, insofar as practicable, provided that no absentee ballots or markers shall be permitted. At this election there shall be submitted to the qualified voters of the county the question of setting up and operating in the county an alcoholic beverage control store, or stores, as herein provided. Those favoring the setting up and operation of alcoholic beverage control stores in the county shall mark in the voting square to the left of the words "for county alcoholic beverage control stores" printed on the ballot, and those opposed to setting up and operating alcoholic beverage control stores in the county shall mark in the voting square to the left of the words "against county alcoholic beverage control stores," printed on the same ballot. If a majority of the votes cast in such election shall be for county alcoholic beverage control stores, then an alcoholic beverage control store, or alcoholic beverage control stores, may be set up and operated in the county as herein provided. If a majority of the votes cast at the election are against county alcoholic beverage control stores, then no alcoholic beverage control store shall be set up or operated in the county under the provisions of this Chapter.

The election shall be called in the county by the board of elections of the county only upon the written request of the board of county commissioners therein, or upon a petition to the board of elections signed by a number of voters of the county equal to at least twenty percent (20%) of the number of registered voters of the county according to the registration figures as certified by the board of elections on the date the petition is presented to the county board of elections.

In calling the special election, the county board of elections shall give at least 30 days' public notice of the election before the closing of the registration books for said election, and the registration books shall close at the same time as for a regular election. A new registration of voters for such special alcoholic beverage control election is not required, and all qualified electors who are properly registered prior to the registration for the special election, as well as those electors who register for the special alcoholic beverage control election, shall be entitled to vote in the election.

Unless otherwise specified in this section, the procedural requirements relating to the petition shall be as provided in G.S. 18A-52(b), (c), (d), and (e), except the question shall be "FOR" and "AGAINST" county alcoholic beverage control stores.

If any county, while operating any alcoholic beverage control store under the provisions of Chapters 418 or 493 of the Public Laws of 1935, or under the terms of this Chapter hereafter under the provisions of this Article holds an election and if at this election a majority of the votes are cast "against county alcoholic beverage control stores," then the alcoholic beverage control board in such county shall, within three months from the canvassing of the vote and the declaration of the result thereof, close the stores and shall thereafter cease to operate them. During this period, the county control board shall dispose of all alcoholic beverages on hand, all fixtures, and all other property in the hands and under the control of the county control board and shall convert the same into money and shall, after making a true and faithful accounting, turn all money in its hands over to the general funds of the county.

No election under this section shall be held on the day of any biennial election for county officers, or within 45 days of such an election. The date of any elections held under this section shall be fixed by the board of elections of the county wherein the election is held.

No other election shall be called and held in any of the counties in the State under the provisions of this section within three years from the holding of the last election under this section. In any county in which an election was held either under the provisions of Chapters 418 and 493 of the Public Laws of 1935, an election may be called under the provisions of this section, provided that no such election shall be called within three years of the holding of the last election.

Nothing herein contained shall be so construed as to require counties in which alcoholic beverage control stores have been established under Chapters 418 or 493 of the Public Laws of 1935 to have any further election in order to enable them to establish alcoholic beverage control stores. Counties in which alcoholic beverage control stores are now being operated under Chapters 418 or 493 of the Public Laws of 1935 shall from February 22, 1937, be operated under the terms of this Chapter.

(b) In any county or city where A.B.C. stores have been established, an election may be called on the question of whether the on-premises sale of mixed beverages should be allowed in social establishments and restaurants. The election shall be called by the board of elections of the county upon, and only upon, the written request of the governing body of the county or a city where A.B.C. stores have been established or upon petition of twenty percent (20%) of the voters registered in that county or city. The provisions of this section with regard to A.B.C. store elections shall apply to the mixed beverages elections except that the propositions to be voted upon shall be the following:

FOR the sale of mixed beverages in social establishments and restaurants.
AGAINST the sale of mixed beverages in social establishments and restaurants.

If a majority of the voters voting in the election vote for the sale of mixed beverages, the sale of mixed beverages shall be permitted in that county or city as provided in G.S. 18A-30. If a county or city has not yet authorized the

establishment of A.B.C. stores, the election on the sale of mixed beverages may be called for the same time as the election on A.B.C. stores. The sale of mixed beverages may not continue at any time after a county or city has voted to no longer operate A.B.C. stores and the previously authorized stores have closed. (1937, c. 49, ss. 25, 26; c. 431; 1971, c. 872, s. 1; 1973, c. 32; 1977, 2nd Sess., c. 1138, s. 15.)

Editor's Note. — The 1977, 2nd Sess., amendment, effective July 1, 1977, designated the former provisions of this section as subsection (a) and added subsection (b). Session Laws 1977, 2nd Sess., c. 1138, s. 17, contains a severability clause.

ARTICLE 6.

Miscellaneous Provisions.

§ 18A-54. Power of Governor to prohibit all sales during an emergency.

(b) When the Governor finds that a state of emergency, as defined in G.S. 14-288.1, exists anywhere within the State, he may order the cessation of all sale or transfer, manufacture, or bottling of malt beverages or wine (fortified or unfortified) or mixed beverages in all or any portion of the State for the period of the emergency. His order shall be directed to the Chairman of the State Board of Alcoholic Control. The express authority granted by this section is not intended to limit any other authority, express or implied, to order cessation of these activities. (1969, c. 869, ss. 4, 5; 1971, c. 872, s. 1; 1977, c. 70, s. 21; 1977, 2nd Sess., c. 1138, s. 16.)

Editor's Note. —

The 1977, 2nd Sess., amendment, effective July 1, 1977, inserted "or mixed beverages" near the middle of subsection (b).

Session Laws 1977, 2nd Sess., c. 1138, s. 17, contains a severability clause.

As the rest of the section was not changed by the amendment, only subsection (b) is set out.

Chapter 19.

Offenses against Public Morals.

ARTICLE 1.

Abatement of Nuisances.

§ 19-1. What are nuisances under this Chapter.

Cross References. —

As to constitutionality of final judgment and order under this Article, see note to § 19-5.

Editor's Note. —

For article, "Regulating Obscenity Through the Power to Define and Abate Nuisances," see 14 Wake Forest L. Rev. 1 (1978).

§ 19-1.1. Definitions.

Quoted in Fehlhaver v. State, 445 F. Supp. 130 (E.D.N.C. 1978).

§ 19-1.2. Types of nuisances.

Quoted in Fehlhaver v. State, 445 F. Supp. 130 (E.D.N.C. 1978).

§ 19-2.1. Action for abatement; injunction.

Editor's Note. —

For a comment on taxpayers' actions, see 13 Wake Forest L. Rev. 397 (1977).

Stated in Fehlhaver v. State, 445 F. Supp. 130 (E.D.N.C. 1978).

§ 19-2.2. Pleadings; jurisdiction; venue; application for preliminary injunction.

Stated in Fehlhaver v. State, 445 F. Supp. 130 (E.D.N.C. 1978).

§ 19-2.3. Temporary order restraining removal of personal property from premises; service; punishment.

Cross Reference. — As to constitutionality of final order and judgment under this Article, see note to § 19-5.

The First Amendment right of the public to receive information is unaffected by the temporary restraining order, and the parallel right of the distributors to dispense the information is not discernibly chilled. Fehlhaver v. State, 445 F. Supp. 130 (E.D.N.C. 1978).

Temporary Restraining Order Does Not Operate as Prior Restraint. — The temporary restraining order authorized to be issued following the filing of the complaint and application for a preliminary injunction does not operate as a prior restraint on the distribution of particular publications and motion pictures

presumptively protected by the First Amendment until an adversary hearing determines otherwise. Fehlhaver v. State, 445 F. Supp. 130 (E.D.N.C. 1978).

Construction of Inventory and Full Accounting Provisions of Section. — Reading this section as a whole, the apparent purpose of the inventory and accounting provision is to provide the factual basis for the determination of whether the business deals in obscene items as a "substantial" portion of its stock in trade, in the case of book stores, or "in the regular course of business," in the case of theaters. Such purpose could be accomplished by a full accounting that included no more than the date, item purchased, and amount paid. Because a

statute may be declared unconstitutional on its face only if it offers no plausible constitutional interpretation, the court adopts this construction of the full accounting provision and not a construction which would require the recording of individual customers who purchase books or attend movies. *Fehlhaber v. State*, 445 F. Supp. 130 (E.D.N.C. 1978).

The requirement of an inventory by an

officer does not require a warrantless search in contravention of the Fourth Amendment, since the clearest reading of the provision is that it directs an officer to enter an establishment that is open to the public and from that vantage point, make an inventory of items of personal property in plain view. *Fehlhaber v. State*, 445 F. Supp. 130 (E.D.N.C. 1978).

§ 19-5. Content of final judgment and order.

Ban on Future Dissemination of Unnamed Books and Movies Is Unconstitutional. —

The clear meaning of this section is that upon a finding that a book store or movie house is a nuisance because it substantially or regularly trades in obscene materials, the superior court judge must enjoin the further distribution by the particular proprietor of any books or movies falling within the statutory definition of

lewdness. *Fehlhaber v. State*, 445 F. Supp. 130 (E.D.N.C. 1978).

The blanket ban on the future dissemination of unnamed books and movies which is the effect of this section transgresses well established First Amendment standards, and thus is constitutionally infirm. *Fehlhaber v. State*, 445 F. Supp. 130 (E.D.N.C. 1978).

§ 19-6. Civil penalty; forfeiture; accounting; lien as to expenses of abatement; invalidation of lease.

Quoted in *Fehlhaber v. State*, 445 F. Supp. 130 (E.D.N.C. 1978).

§ 19-8.2. Right of entry.

Stated in *Fehlhaber v. State*, 445 F. Supp. 130 (E.D.N.C. 1978).

§ 19-8.3. Severability.

Applied in *Fehlhaber v. State*, 445 F. Supp. 130 (E.D.N.C. 1978).

ARTICLE 2.

Civil Remedy for Sales of Harmful Materials to Minors.

§ 19-9. Title.

Editor's Note. —

For article, "Regulating Obscenity Through

the Power to Define and Abate Nuisances," see 14 Wake Forest L. Rev. 1 (1978).

Chapter 19A.

Protection of Animals.

Article 2.

Protection of Black Bears.

Sec.

19A-15 to 19A-19. [Reserved.]

Article 3.

Animal Welfare Act.

19A-20. Title of Article.

19A-21. Purposes.

19A-22. Animal Welfare Section in Animal Health Division of Department of Agriculture created; Director.

19A-23. Definitions.

19A-24. Rules and regulations of Board of Agriculture.

19A-25. Employees; investigations; right of entry.

19A-26. Certificate of registration required for animal shelter.

19A-27. License required for operation of pet shop.

Sec.

19A-28. License required for public auction or boarding kennel.

19A-29. License required for dealer.

19A-30. Refusal, suspension or revocation of certificate or license.

19A-31. License not transferable; change in management, etc., of business or operation.

19A-32. Proceedings under Article; appeals.

19A-33. Penalty for operation of pet shop, kennel or auction without license.

19A-34. Penalty for acting as dealer without license; disposition of animals in custody of unlicensed dealer.

19A-35. Penalty for failure to adequately care for animals; disposition of animals.

19A-36. Penalty for violation of Article by dog warden.

19A-37. Application of Article.

19A-38. Use of license fees.

19A-39. Article inapplicable to establishments for training hunting dogs.

ARTICLE 2.

Protection of Black Bears.

§§ 19A-15 to 19A-19: Reserved for future codification purposes.

Article 3.

Animal Welfare Act.

§ 19A-20. **Title of Article.** — This Article may be cited as the Animal Welfare Act. (1977, 2nd Sess., c. 1217, s. 1.)

Editor's Note. — Session Laws 1977, 2nd Sess., c. 1217, s. 23, makes the act effective Jan. 1, 1979. Sess. Laws 1977, 2nd Sess., c. 1217, s. 20, contains a severability clause.

§ 19A-21. **Purposes.** — The purposes of this Article are (i) to protect the owners of dogs and cats from the theft of such pets; (ii) to prevent the sale or use of stolen pets; (iii) to insure that animals, as items of commerce, are provided humane care and treatment by regulating the transportation, sale, purchase, housing, care, handling and treatment of such animals by persons or organizations engaged in transporting, buying, or selling them for such use; (iv) to insure that animals confined in pet shops, kennels, animal shelters and auction markets are provided humane care and treatment; (v) to prohibit the sale, trade or adoption of those animals which show physical signs of infection, communicable disease, or congenital abnormalities, unless veterinary care is assured subsequent to sale, trade or adoption. (1977, 2nd Sess., c. 1217, s. 2.)

§ 19A-22. **Animal Welfare Section in Animal Health Division of Department of Agriculture created; Director.** — There is hereby created within

the Animal Health Division of the North Carolina Department of Agriculture, a new section thereof, to be known as the Animal Welfare Section of said division.

The Commissioner of Agriculture is hereby authorized to appoint a Director of said section whose duties and authority shall be determined by the Commissioner subject to the approval of the Board of Agriculture and subject to the provisions of this Article. (1977, 2nd Sess., c. 1217, s. 3.)

§ 19A-23. Definitions. — For the purposes of this Article, the following terms, when used in the Article or the rules and regulations or orders made pursuant thereto, shall be construed respectively to mean:

- (1) "Adequate feed" means the provision at suitable intervals, not to exceed 24 hours, of a quantity of wholesome foodstuff suitable for the species and age, sufficient to maintain a reasonable level of nutrition in each animal. Such foodstuff shall be served in a sanitized receptacle, dish, or container.
- (2) "Adequate water" means a constant access to a supply of clean, fresh, potable water provided in a sanitary manner or provided at suitable intervals for the species and not to exceed 24 hours at any interval.
- (3) "Ambient temperature" means the temperature surrounding the animal.
- (4) "Animal" means any domestic dog (*Canis familiaris*), domestic cat (*Felis domestica*).
- (5) "Animal shelter" means a facility which is used to house or contain animals and which is owned, operated, or maintained by a duly incorporated humane society, animal welfare society, society for the prevention of cruelty to animals, or other nonprofit organization devoted to the welfare, protection and humane treatment of animals.
- (6) "Commissioner" means the Commissioner of Agriculture of the State of North Carolina.
- (7) "Dealer" means any person who sells, exchanges, or donates, or offers to sell, exchange, or donate animals to another dealer, pet shop, or research facility; provided, however, that an individual who breeds and raises on his own premises no more than the offspring of five canine or feline females per year, unless bred and raised specifically for research purposes shall not be considered to be a dealer for the purposes of this Article.
- (8) "Director" means the Director of the Animal Welfare Section of the Animal Health Division of the Department of Agriculture.
- (9) "Euthanasia" means the human [humane] destruction of an animal accomplished by a method that involves rapid unconsciousness and immediate death or by a method that involves anesthesia, produced by an agent which causes painless loss of consciousness, and death during such loss of consciousness.
- (10) "Housing facility" means any room, building, or area used to contain a primary enclosure or enclosures.
- (11) "Person" means any individual, partnership, firm, joint-stock company, corporation, association, trust, estate, or other legal entity.
- (12) "Pet shop" means a person or establishment that acquires for the purposes of resale animals bred by others whether as owner, agent, or on consignment, and that sells, trades or offers to sell or trade such animals to the general public at retail or wholesale.
- (13) "Primary enclosure" means any structure used to immediately restrict an animal or animals to a limited amount of space, such as a room, pen, cage compartment or hutch.
- (14) "Public auction" means any place or location where dogs or cats are sold at auction to the highest bidder regardless of whether such dogs

or cats are offered as individuals, as a group, or by weight.

- (15) "Research facility" means any place, laboratory, or institution at which scientific tests, experiments, or investigations involving the use of living animals are carried out, conducted, or attempted.
- (16) "Sanitize" means to make physically clean and to remove and destroy to a practical minimum, agents injurious to health. (1977, 2nd Sess., c. 1217, s. 4.)

§ 19A-24. Rules and regulations of Board of Agriculture. — The Board of Agriculture is hereby authorized and empowered to make such reasonable rules and regulations with regard to animal welfare as may be necessary to carry out the objectives and the intent of this Article. Such rules and regulations may include but are not limited to provisions relating to humane transportation to and from registered or licensed premises, records of purchase and sale, identification of animals handled, primary enclosures, housing facilities, sanitation, euthanasia, ambient temperatures, feeding, watering, and veterinary medical care. It may, after public hearing shall have been held and notification of such hearing having been given to all licensees, adopt in whole or in part those portions of the rules and regulations, promulgated by the Secretary of the United States Department of Agriculture pursuant to the provisions of the United States Public Law 89-544, commonly known as the Laboratory Animal Welfare Act, which are consistent with the intent and purpose of this Article. (1977, 2nd Sess., c. 1217, s. 5.)

§ 19A-25. Employees; investigations; right of entry. — For the enforcement of the provisions of this Article, the Director is authorized, subject to the approval of the Commissioner to appoint employees as are necessary in order to carry out and enforce the provisions of this Article, and to assign them interchangeably with other employees of the Animal Health Division. The Director shall cause the investigation of all reports of violations of the provisions of this Article, and the rules and regulations adopted pursuant to the provisions hereof; provided further that if any person shall deny the Director or his representative admittance to his property, either person shall be entitled to secure from any superior court judge a court order granting such admittance. (1977, 2nd Sess., c. 1217, s. 6.)

§ 19A-26. Certificate of registration required for animal shelter. — No person shall operate an animal shelter for more than one year subsequent to January 1, 1979, unless a certificate of registration for such animal shelter shall have been granted by the Director. Application for such certificate shall be made in the manner provided by the Director. No fee shall be required for such application or certificate. Certificates of registration shall be valid for a period of one year or until suspended or revoked and may be renewed for like periods upon application in the manner provided. (1977, 2nd Sess., c. 1217, s. 7.)

§ 19A-27. License required for operation of pet shop. — No person shall operate a pet shop as defined in this Article for more than six months subsequent to January 1, 1979, unless a license to operate such establishment shall have been granted by the Director. Application for such license shall be made in the manner provided by the Director. The license shall be for the fiscal year and the license fee shall be twenty-five dollars (\$25.00) for each license period or part thereof beginning with the first day of the fiscal year. (1977, 2nd Sess., c. 1217, s. 8.)

§ 19A-28. License required for public auction or boarding kennel. — No person shall operate a public auction or a boarding kennel as defined in this Article for more than six months subsequent to January 1, 1979, unless a license to operate such establishment shall have been granted by the Director.

Application for such license shall be made in the manner provided by the Director. The license period shall be the fiscal year and the license fee shall be twenty-five dollars (\$25.00) for each license period or part thereof beginning with the first day of the fiscal year. (1977, 2nd Sess., c. 1217, s. 9.)

§ 19A-29. License required for dealer. — No person shall be a dealer as defined in this Article for more than six months after January 1, 1979, unless a license to deal shall have been granted by the Director to such person. Application for such license shall be in the manner provided by the Director. The license period shall be the fiscal year and the license fee shall be twenty-five dollars (\$25.00) for each license period or part thereof, beginning with the first day of the fiscal year. (1977, 2nd Sess., c. 1217, s. 10.)

§ 19A-30. Refusal, suspension or revocation of certificate or license. — The Director may refuse to issue or renew or may suspend or revoke a certificate of registration for any animal shelter or a license for any public auction, kennel, pet shop, or dealer, if after an impartial investigation as provided in this Article he determines that any one or more of the following grounds apply:

- (1) Material misstatement in the application for the original certificate of registration or license or in the application for any renewal under this Article;
- (2) Willful disregard or violation of this Article or any regulations or rules issued pursuant thereto;
- (3) Failure to provide adequate housing facilities and/or primary enclosures for the purposes of this Article, or if the feeding, watering, sanitizing and housing practices at the animal shelter, public auction, pet shop, or kennel are not consistent with the intent of this Article or with the intent of the rules and regulations which may be promulgated pursuant to the authority of this Article;
- (4) Allowing one's license under this Article to be used by an unlicensed person;
- (5) Conviction of any crime an essential element of which is misstatement, fraud, or dishonesty, or conviction of any felony;
- (6) Making substantial misrepresentations or false promises of a character likely to influence, persuade, or induce in connection with the business of a public auction, commercial kennel, pet shop, or dealer;
- (7) Pursuing a continued course of misrepresentation of or making false promises through advertising, salesmen, agents, or otherwise in connection with the business to be licensed;
- (8) Failure to possess the necessary qualifications or to meet the requirements of this Article for the issuance or holding of a certificate of registration or license.

The Director shall, before refusing to issue or renew and before suspension or revocation of a certificate of registration or a license, give to the applicant or holder thereof a written notice containing a statement indicating in what respects the applicant or holder has failed to satisfy the requirements for the holding of a certificate of registration or a license. If a certificate of registration or a license is suspended or revoked under the provisions hereof, the holder shall have five days from such suspension or revocation to surrender all certificates of registration or licenses issued thereunder to the Director or his authorized representative.

Any person to whom a certificate of registration or a license is denied, suspended, or revoked by the Director, may appeal such denial, suspension, or revocation by filing within five days in writing with the Director a request for a public hearing before the Board of Agriculture or its designated hearing officer, and such hearing shall be held within 10 days and shall be conducted in accordance with the provisions of G.S. 19A-32.

Any licensee whose license is revoked under the provisions of this Article shall not be eligible to apply for a new license hereunder until one year has elapsed from the date of the order revoking said license or if an appeal is taken from said order of revocation, one year from the date of the order or final judgment sustaining said revocation. Any person who has been an officer, agent, or employee of a licensee whose license has been revoked or suspended and who is responsible for or participated in the violation upon which the order of suspension or revocation was based, shall not be licensed within the period during which the order of suspension or revocation is in effect. (1977, 2nd Sess., c. 1217, s. 11.)

§ 19A-31. License not transferable; change in management, etc., of business or operation. — A license is not transferable. When there is a transfer of ownership, management, or operation of a business of a licensee hereunder, the new owner, manager, or operator, as the case may be, whether it be an individual, firm, partnership, corporation, or other entity shall have 10 days from such sale or transfer to secure a new license from the Director to operate said business. A licensee shall promptly notify the Director of any change in the name, address, management, or substantial control of his business or operation. (1977, 2nd Sess., c. 1217, s. 12.)

§ 19A-32. Proceedings under Article; appeals. — Proceedings under this Article shall be taken by the Board of Agriculture or its delegated hearing officer when accusation is made in writing and under oath. Upon receiving such accusation, the Board of Agriculture, or its hearing officer, shall serve notice by registered mail or personally of the time and place of the hearing, and a copy of the charges upon the accused at least 15 days before the date of the hearing. The Board of Agriculture, or its hearing officer, for sufficient cause in its discretion, may postpone or continue said hearing from time to time, or if after proper notice no appearance is made by the accused, the board or the hearing officer may enter judgment at the time of hearing as prescribed herein, either by suspending or revoking the license of the accused or dismissing the accusation. Both the Board of Agriculture, or hearing officer, and the accused may have the benefit of counsel and the right to cross-examine witnesses, to take depositions, and to compel attendance of witnesses as in cases by subpoena issued by the Director under the seal of the Board of Agriculture, and in the name of the State of North Carolina. The testimony of all witnesses at any hearing before the Board of Agriculture, or hearing officer, shall be under oath or affirmation. The Director is authorized to reimburse witnesses for their time and travel, and to award expert witness fees to witnesses so qualified. The record of all hearings and judgments shall be kept by the Secretary of the Board of Agriculture, and in the event of suspension or revocation of certificate of registration or license, the Secretary shall within 10 days transmit a certified copy of said judgment to the clerk of the superior court of the county of the residence of the accused or his registered agent, and the clerk shall file said judgment in the judgment docket of said county.

Any person may appeal to the Superior Court of Wake County the denial of a certificate of registration or license, and any holder of a certificate of registration or licensee may appeal to the Superior Court of Wake County the failure to renew any certificate of registration or license or the revocation or suspension of the license issued under the provisions of this Article, and such appeals shall be made pursuant to the provisions of Chapter 150A of the General Statutes. (1977, 2nd Sess., c. 1217, s. 13.)

§ 19A-33. Penalty for operation of pet shop, kennel or auction without license. — Operation of a pet shop, kennel, or public auction without a currently valid license shall constitute a misdemeanor subject to a penalty of not less than five dollars (\$5.00) nor more than twenty-five dollars (\$25.00), and each day of

operation shall constitute a separate offense. (1977, 2nd Sess., c. 1217, s. 14.)

§ 19A-34. Penalty for acting as dealer without license; disposition of animals in custody of unlicensed dealer.—Acting as a dealer in animals as defined in this Article without a currently valid dealer's license shall constitute a misdemeanor subject to a penalty of not less than five dollars (\$5.00) nor more than twenty-five dollars (\$25.00), or imprisonment for a period not to exceed six months, or both fine and imprisonment. Continued illegal operation after conviction shall constitute a separate offense. Animals found in possession or custody of an unlicensed dealer shall be subject to immediate seizure and impoundment and upon conviction of such unlicensed dealer shall become subject to sale or euthanasia in the discretion of the Director. (1977, 2nd Sess., c. 1217, s. 15.)

§ 19A-35. Penalty for failure to adequately care for animals; disposition of animals.—Failure of any person licensed or registered under this Article to adequately house, feed, and water animals in his possession or custody shall constitute a misdemeanor, and such person shall be subject to a fine of not less than five dollars (\$5.00) per animal or more than a total of one thousand dollars (\$1,000). Such animals shall be subject to seizure and impoundment and upon conviction may be sold or euthanized at the discretion of the Director and such failure shall also constitute grounds for revocation of license after public hearing. The Director is hereby authorized to disburse State funds in such amount as in his discretion is necessary to provide for the welfare of the animals until either sold or euthanized and any fine levied in connection with this section shall be applied toward reimbursement of such State funds as the Director shall have expended. (1977, 2nd Sess., c. 1217, s. 16.)

§ 19A-36. Penalty for violation of Article by dog warden.—Violation of any provision of this Article which relates to the seizing, impoundment, and custody of an animal by a dog warden shall constitute a misdemeanor and the person convicted thereof shall be subject to a fine of not less than fifty dollars (\$50.00) and not more than one hundred dollars (\$100.00), and each animal handled in violation shall constitute a separate offense. (1977, 2nd Sess., c. 1217, s. 17.)

§ 19A-37. Application of Article.—This Article shall not apply to a place or establishment which is operated under the immediate supervision of a duly licensed veterinarian as a hospital where animals are harbored, boarded, and cared for incidental to the treatment, prevention, or alleviation of disease processes during the routine practice of the profession of veterinary medicine. This Article shall not apply to any dealer, pet shop, public auction, commercial kennel or research facility during the period such dealer or research facility is in the possession of a valid license or registration granted by the Secretary of Agriculture pursuant to the provisions of United States Public Law 89-544. This Article shall not apply to any individual who occasionally boards an animal on a noncommercial basis, although such individual may receive nominal sums to cover the cost of such boarding. (1977, 2nd Sess., c. 1217, s. 18.)

§ 19A-38. Use of license fees.—All license fees collected shall be used in enforcing and administering this Article. (1977, 2nd Sess., c. 1217, s. 19.)

§ 19A-39. Article inapplicable to establishments for training hunting dogs.—Nothing in this Article shall apply to those kennels or establishments operated primarily for the purpose of training hunting dogs. (1977, 2nd Sess., c. 1217, s. 21.)

Chapter 20. Motor Vehicles.

Article 3.

Motor Vehicle Act of 1937.

Part 9. The Size, Weight, Construction
and Equipment of Vehicles.

Sec.

20-118. Weight of vehicles and load.

Article 7.

Miscellaneous Provisions Relating to Motor Vehicles.

Sec.

20-217. Motor vehicles to stop for properly
marked and designated school buses
in certain instances.

ARTICLE 1.

Division of Motor Vehicles.

§ 20-1. Division of Motor Vehicles of the Department of Transportation; powers and duties.

Cited in *State v. Wyrick*, 35 N.C. App. 352, 241
S.E.2d 355 (1978).

§ 20-4.01. Definitions.

Construction of Subdivision (13). — The definition of “highway” in subdivision (13) is to be construed so as to give its terms their plain and ordinary meaning. *Smith v. Powell*, 293 N.C. 342, 238 S.E.2d 137 (1977).

The legislature has provided that, unless the context requires otherwise, the word “highway” is to be given the same connotation in all of the provisions of Chapter 20, whether they be penal, remedial or otherwise. Thus, the well known principles of statutory construction that a penal statute is to be strictly construed and a statute designed to promote safety is to be liberally construed have no application. *Smith v. Powell*, 293 N.C. 342, 238 S.E.2d 137 (1977).

“Highway” Distinguished from Roadway. — The definitions of “highway” and “roadway,” considered together, show that the legislature in defining “highway” intended to make it clear that the entire “width” between the right-of-way lines is included in a “highway” as distinguished from a “roadway.” *Smith v. Powell*, 293 N.C. 342, 238 S.E.2d 137 (1977).

Definition of “Highway” Is Concerned with Width, Not Depth. — While it is true that a “highway” or a “street” is not limited to its surface so far as the right of the State to use, maintain and protect it from damage and private use are concerned, and in this sense, it includes not only the entire thickness of the pavement and the prepared base upon which it rests but also so much of the depth as may not unfairly be used as streets are used for the laying therein of drainage systems and conduits for sewer, water and other services, nevertheless, the primary concern of the legislature in defining “highway” as used in Chapter 20 was with the “width,” not the depth. “Width” means “the lineal extent of a thing from side to side.” *Smith v. Powell*, 293 N.C. 342, 238 S.E.2d 137 (1977).

Area beneath Highway Bridge Not “Highway.” — A petitioner who drove a motor vehicle only within the limits of the area beneath a highway bridge did not drive on a “highway” as that term is used in § 20-16.2. *Smith v. Powell*, 293 N.C. 342, 238 S.E.2d 137 (1977).

ARTICLE 2.

Uniform Driver’s License Act.

§ 20-9. What persons shall not be licensed.

Cited in *Nationwide Mut. Ins. Co. v. Chantos*,
293 N.C. 431, 238 S.E.2d 597 (1977).

§ 20-16. Authority of Division to suspend license.

I. IN GENERAL.

The power to issue, suspend or revoke a driver's license is vested exclusively in the Division of Motor Vehicles, subject to review by the superior court and, upon appeal, by the appellate division. *Smith v. Walsh*, 34 N.C. App. 287, 238 S.E.2d 157 (1977).

Power to suspend, etc. —

Under subdivision (a) (10) of this section and § 20-19(b), the discretionary authority to suspend petitioner's license for a period not

exceeding 12 months was vested exclusively in the Division of Motor Vehicles. No discretionary power was conferred upon a superior court. *Smith v. Walsh*, 34 N.C. App. 287, 238 S.E.2d 157 (1977).

Stated in *State ex rel. Comm'r of Ins. v. North Carolina Auto. Rate Administrative Office*, 293 N.C. 365, 239 S.E.2d 48 (1977).

Cited in *In re Nowell*, 293 N.C. 235, 237 S.E.2d 246 (1977).

§ 20-16.2. Mandatory revocation of license in event of refusal to submit to chemical tests; right of driver to request test.

Area beneath Highway Bridge Not "Highway or Public Vehicular Area." — One who drives a motor vehicle only within the limits of the area beneath a highway bridge is not driving "on a highway or public vehicular area" as those terms are used in this section. *Smith v. Powell*, 293 N.C. 342, 238 S.E.2d 137 (1977).

Suspect Not Entitled to Drive Own Car to Test Site. — A person suspected of driving while under the influence who requests a prearrest chemical test pursuant to § 20-16.2(i) does not have to be permitted to drive his own vehicle to the test site. Opinion of Attorney General to Chief P.L. McIver, Garner Police Department, Garner, N.C., 47 N.C.A.G. 89 (1977).

The effect of subsection (a) of this section is to require a defendant to exercise his rights in a timely manner. *State v. Lloyd*, 33 N.C. App. 370, 235 S.E.2d 281 (1977).

Subsection (a) Complied with. — Having placed the information required by subsection (a) in writing before the defendant, the operator was not required to make defendant read it. The operator complied fully with the statute when he orally advised defendant and placed the required information in writing before defendant with the opportunity on defendant's part to read the same. *State v. Carpenter*, 34 N.C. App. 742, 239 S.E.2d 596 (1977).

The breathalyzer test will be delayed a maximum of 30 minutes from the time defendant is notified of his rights. *State v. Lloyd*, 33 N.C. App. 370, 235 S.E.2d 281 (1977).

The purpose of the 30-minute delay is to allow the defendant, who exercises his rights, a reasonable but limited amount of time to procure the presence of a lawyer, doctor, nurse or witness. *State v. Lloyd*, 33 N.C. App. 370, 235 S.E.2d 281 (1977).

Test Administered Whether or Not

Requested Persons Have Arrived. — Even if the defendant does exercise his rights within 30 minutes of notification, the test can and will be administered after the lapse of 30 minutes regardless of whether the requested persons have arrived. *State v. Lloyd*, 33 N.C. App. 370, 235 S.E.2d 281 (1977).

The police are not required to delay testing unless the defendant exercises his rights. *State v. Lloyd*, 33 N.C. App. 370, 235 S.E.2d 281 (1977).

When Delay of Less Than 30 Minutes Permissible. — This section provides for a delay not in excess of 30 minutes for defendant to exercise his rights, and a delay of less than 30 minutes is permissible where the record is barren of any evidence to support a contention, if made, that a lawyer or witness would have arrived to witness the proceeding had the operator delayed the test to the maximum time of 30 minutes. *State v. Buckner*, 34 N.C. App. 447, 238 S.E.2d 635 (1977).

Subdivision (a) (4) of this section constitutes a maximum of 30 minutes delay for the defendant to obtain a lawyer or witness. It does not require that the administering officer wait 30 minutes before giving the test when the defendant has waived the right to have a lawyer or witness present or when it becomes obvious that defendant does not intend to exercise this right. *State v. Buckner*, 34 N.C. App. 447, 238 S.E.2d 635 (1977).

There was no error in the testing procedures or in the admission of the test results where there was a period of 25 minutes after notification to the defendant of his rights during which the defendant made no effort to exercise rights, and where, at the time the test was administered, the defendant made no effort to exercise his rights. *State v. Lloyd*, 33 N.C. App. 370, 235 S.E.2d 281 (1977).

§ 20-19. Period of suspension or revocation.

The power to issue, suspend or revoke a driver's license is vested exclusively in the

Division of Motor Vehicles, subject to review by the superior court and, upon appeal, by the

appellate division. *Smith v. Walsh*, 34 N.C. App. 287, 238 S.E.2d 157 (1977).

Under § 20-16(a) (10) and subsection (b) of this section, the discretionary authority to suspend petitioner's license for a period not exceeding 12

months was vested exclusively in the Division of Motor Vehicles. No discretionary power was conferred upon a superior court. *Smith v. Walsh*, 34 N.C. App. 287, 238 S.E.2d 157 (1977).

§ 20-25. Right of appeal to court.

Superior Court Is Not Vested with Discretionary Authority. — On appeal and hearing de novo in superior court, that court is not vested with discretionary authority. It makes judicial review of the facts, and if it finds

that the license of petitioner is in fact and in law subject to suspension or revocation the order of the Division of Motor Vehicles must be affirmed. *Smith v. Walsh*, 34 N.C. App. 287, 238 S.E.2d 157 (1977).

§ 20-26. Records; copies furnished.

Division May Not Furnish Listings for Commercial Purposes. — The Division of Motor Vehicles is not required or permitted under the statutes to sell or furnish selective listings (i.e., by age, sex, etc.) in bulk or on computer tapes

from the driver's license files for commercial purposes. Opinion of Attorney General to Mr. Zeb Hocutt, Jr., Director, Driver License Section, Division of Motor Vehicles, 47 N.C.A.G. 59 (1977).

§ 20-28. Unlawful to drive while license suspended or revoked.

Editor's Note. —

For survey of 1976 case law on criminal law, see 55 N.C.L. Rev. 976 (1977).

ARTICLE 3.

Motor Vehicle Act of 1937.

Part 4. Transfer of Title or Interest.

§ 20-78. When Division to transfer registration and issue new certificate; recordation.

Cited in *Sutton v. Sutton*, 35 N.C. App. 670, 242 S.E.2d 644 (1978).

Part 7. Title and Registration Fees.

§ 20-91.1. Taxes to be paid; suits for recovery of taxes.

Editor's Note. — For survey of 1976 case law on taxation, see 55 N.C.L. Rev. 1083 (1977).

Cited in *C & H Transp. Co. v. North Carolina*

Div. of Motor Vehicles, 34 N.C. App. 616, 239 S.E.2d 309 (1977).

Part 8. Anti-Theft and Enforcement Provisions.

§ 20-106. Receiving or transferring stolen vehicles.

Editor's Note. — For survey of 1976 case law on criminal law, see 55 N.C. L. Rev. 976 (1977).

Sufficiency of Evidence. — Evidence that the defendant was in possession of the stolen vehicle

approximately one month after it was stolen was not sufficient to raise an inference that the defendant knew or had reason to believe that the automobile was stolen where the evidence offered by the State demonstrated the intervening agency of others. *State v. Leonard*, 34 N.C. App. 131, 237 S.E.2d 347 (1977).

Evidence tending to show that the public

vehicle identification number plate on an automobile had been replaced was not sufficient to raise an inference that defendant knew or had reason to believe that the vehicle was stolen, where there was no evidence that the alteration was made by defendant or with his knowledge. *State v. Leonard*, 34 N.C. App. 131, 237 S.E.2d 347 (1977).

§ 20-109. Altering or changing engine or other numbers.

The requirement that a serial or motor number alleged to have been altered be one assigned to a vehicle by the Division of Motor Vehicles of the Department of Transportation is an essential element of the offense condemned

by subdivision (b) (1) of this section. Before the State is entitled to a conviction, it must prove the presence of this element beyond a reasonable doubt from the evidence. *State v. Wyrick*, 35 N.C. App. 352, 241 S.E.2d 355 (1978).

Part 9. The Size, Weight, Construction and Equipment of Vehicles.

§ 20-116. Size of vehicles and loads.

Overhang of Load on Rear of Semi-Trailer.

— A tractor and semi-trailer transporting motor vehicles (cars and trucks) is not permitted to have an overhang of the load on the rear of the semi-trailer if the tractor and semi-trailer, when

coupled together, inclusive of the front and rear bumpers, are 55 feet in length. Opinion of Attorney General to Mr. Elbert L. Peters, Jr., Commissioner of Motor Vehicles, 47 N.C.A.G. 116 (1977).

§ 20-118. Weight of vehicles and load. — No vehicle or combination of vehicles shall be moved or operated on any highway or bridge when the gross weight thereof exceeds the limits specified below:

- (8) The gross weight of any vehicle having two axles shall not exceed 30,000 pounds, unless used in connection with a combination consisting of four axles or more. For the purpose of determining the maximum weight to be allowed for passenger buses to be operated upon the highways of this State, the Commissioner of Motor Vehicles shall require, prior to the issuance of license, a certificate showing the weight of such bus when fully equipped for the road. Unless the applicant holds a special permit from the Department of Transportation, no license shall be issued to any passenger bus with two axles having a weight, when fully equipped for operation on the highways, of more than 22,500 pounds, and no license shall be issued for any passenger bus with three axles having a weight, when fully equipped for operation on the highways, of more than 30,000 pounds, unless the bus for which application for license is made shall have been licensed in the State of North Carolina prior to the first day of February, 1949. (1977, 2nd Sess., c. 1178.)

Editor's Note. — The 1977, 2nd Sess., amendment, in subdivision (8), added "Unless the applicant holds a special permit from the Department of Transportation" at the beginning of the third sentence and deleted the former last sentence, which read: "No special permits shall

be issued for any passenger buses exceeding the foregoing specified weights for each group."

As the rest of the section was not changed by the amendment, only the introductory language and subdivision (8) are set out.

§ 20-119. Special permits for vehicles of excessive size or weight.

Cited in *C & H Transp. Co. v. North Carolina Div. of Motor Vehicles*, 34 N.C. App. 616, 239 S.E.2d 309 (1977).

§ 20-129. Required lighting equipment of vehicles.

Cited in *C & H Transp. Co. v. North Carolina Div. of Motor Vehicles*, 34 N.C. App. 616, 239 S.E.2d 309 (1977).

Part 10. Operation of Vehicles and Rules of the Road.

§ 20-138. Persons under the influence of intoxicating liquor.

I. GENERAL CONSIDERATION.

Editor's Note. —

For survey of 1976 case law on criminal law,

see 55 N.C.L. Rev. 976 (1977).

Cited in *State v. Hice*, 34 N.C. App. 468, 238 S.E.2d 619 (1977).

§ 20-139.1. Result of a chemical analysis admissible in evidence; presumption.

II. ADMINISTRATION OF TEST.

The purpose, etc. —

In accord with original. See *State v. Jordan*, 35 N.C. App. 652, 242 S.E.2d 192 (1978).

The principle that underlies the limitation in subsection (b) of this section seems to be that, in the interest of fairness as well as the appearance of fairness, an officer, whose judgment in selecting a defendant for arrest or in making the arrest may be at issue at trial, should not administer the chemical test that will either confirm or refute the soundness of his

earlier judgment in causing the arrest. *State v. Jordan*, 35 N.C. App. 652, 242 S.E.2d 192 (1978).

Officer Who Previously Arrested Defendant on Similar Charge May Administer Test. — Where an officer had nothing to do with defendant's second arrest, his arrest of defendant on a similar charge earlier in the morning did not bring him within the disqualification set out in subsection (b) of this section. *State v. Jordan*, 35 N.C. App. 652, 242 S.E.2d 192 (1978).

§ 20-140. Reckless driving.

Quoted in *State v. Snead*, 35 N.C. App. 724, 242 S.E.2d 530 (1978).

§ 20-141. Speed restrictions.

Cited in *Holt v. City of Statesville*, 35 N.C. App. 381, 241 S.E.2d 362 (1978).

§ 20-141.4. Death by vehicle.

Editor's Note. — For survey of 1976 case law on criminal law, see 55 N.C.L. Rev. 976 (1977).

The failure of the trial judge to allow the jury to consider the lesser degree of homicide of death by vehicle constituted prejudicial error that was not cured by a verdict of guilty of the more serious crime of involuntary man-

slaughter, where the evidence would have permitted the jury to find the defendant guilty of death by vehicle. *State v. Baum*, 33 N.C. App. 633, 236 S.E.2d 31, cert. denied, 293 N.C. 253, 237 S.E.2d 536 (1977).

Cited in *State v. Hice*, 34 N.C. App. 468, 238 S.E.2d 619 (1977).

§ 20-150. Limitations on privilege of overtaking and passing.

Cited in *Bell v. Brueggemyer*, 35 N.C. App. 658, 242 S.E.2d 392 (1978).

§ 20-154. Signals on starting, stopping or turning.**IV. NEGLIGENCE AND PROXIMATE CAUSE.****Violation to Be Considered, etc. —**

In accord with 1st paragraph in original. See *Mintz v. Foster*, 35 N.C. App. 638, 242 S.E.2d 181 (1978).

§ 20-161. Stopping on highway prohibited; warning signals; removal of vehicles from public highway.

Cited in *Digsby v. Gregory*, 35 N.C. App. 59, 240 S.E.2d 491 (1978).

Part 12. Sentencing; Penalties.**§ 20-179. Penalty for driving or operating vehicle while under the influence of intoxicating liquor, narcotic drugs, or other impairing drugs; limited driving permits for first offenders.**

Amendment effective March 1, 1979. — Session Laws 1977, 2nd Sess., c. 1222, effective March 1, 1979, rewrites subsection (a) of this section to read as follows:

"(a) Every person who is convicted of violating G.S. 20-138, 20-139(a), or 20-139(b) shall be punished as follows:

"(1) For a conviction of a first offense, a fine of not less than one hundred dollars (\$100.00) nor more than five hundred dollars (\$500.00), by imprisonment for not more than six months, or by both such fine and imprisonment, in the discretion of the court;

"(2) For a conviction of a second offense, imprisonment for not less than three days nor more than one year and a fine not less than two hundred dollars (\$200.00) nor more than five hundred dollars (\$500.00);

"(3) For a conviction of a third or

subsequent offense, imprisonment for not less than three days nor more than two years and a fine of not less than five hundred dollars (\$500.00).

The first three days of imprisonment pursuant to subdivisions (2) and (3) above shall not be subject to suspension or parole; provided that in lieu of such imprisonment pursuant to subdivision (2) above the court may allow the defendant to participate in a program for alcohol or drug rehabilitation approved for this purpose by the Department of Human Resources; and upon defendant's successful completion of such program the court may suspend all or any part of the term of imprisonment. Convictions for offenses occurring prior to July 1, 1978, or more than three years prior to the current offense shall not be considered prior offenses for the purpose of subdivisions (2) and (3) above."

As subsection (b) was not changed by the amendment, it is not set out.

§ 20-183. Duties and powers of law-enforcement officers; warning by local officers before stopping another vehicle on highway; warning tickets.

The power to stop a vehicle under this section is not dependent on probable cause to believe a violation has occurred. *State v. Blackwelder*, 34 N.C. App. 352, 238 S.E.2d 190 (1977).

Power to Stop Vehicle Does Not Include Power to Search. — The power to stop a vehicle under this section does not include the power to search. The power to search incident to a warrantless arrest is clearly limited to situations where the officer, after stopping the vehicle, has found a person "violating the provisions of this Article." *State v. Blackwelder*, 34 N.C. App. 352, 238 S.E.2d 190 (1977).

Stopping Vehicle to Determine If Driver Possessed Contraband Drugs. — Where there was no evidence that the officer stopped the vehicle operated by the defendant for the purpose of determining if he had violated a motor vehicle statute, but rather, the obvious purpose in stopping the vehicle was to determine if the defendant possessed contraband drugs, the officer had no right to remove the defendant from and search the vehicle. *State v. Blackwelder*, 34 N.C. App. 352, 238 S.E.2d 190 (1977).

Cited in *State v. Bridges*, 35 N.C. App. 81, 239 S.E.2d 856 (1978).

ARTICLE 7.

Miscellaneous Provisions Relating to Motor Vehicles.

§ 20-217. Motor vehicles to stop for properly marked and designated school buses in certain instances. — The driver of any vehicle upon approaching from any direction on the same street or highway any school bus (including privately owned buses transporting children and school buses transporting elderly persons under G.S. 115-183.1), while such bus is displaying its mechanical stop signal, or is stopped for the purpose of receiving or discharging passengers, shall bring his vehicle to a full stop before passing or attempting to pass such bus, and shall remain stopped until the mechanical stop signal has been withdrawn or until the bus has moved on. The driver of a vehicle upon any interstate or other controlled-access highway need not stop upon meeting or passing a school bus which is in the roadway across the dividing space or physical barrier separating the roadways.

The provisions of this section are applicable only in the event the school bus bears upon the front and rear a plainly visible sign containing the words "school bus" in letters not less than eight inches in height.

Any person violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not to exceed two hundred dollars (\$200.00) or imprisoned not to exceed 90 days. (1925, c. 265; 1943, c. 767; 1947, c. 527; 1955, c. 1365; 1959, c. 909; 1965, c. 370; 1969, c. 952; 1971, c. 245, s. 1; 1973, c. 1330, s. 35; 1977, 2nd Sess., c. 1280, s. 4.)

Editor's Note. — The 1977, 2nd Sess., amendment added "and school buses transporting elderly persons under G.S.

115-183.1" in the parenthetical phrase in the first sentence of the first paragraph.

§ 20-218. Standard qualifications for school bus drivers; speed limit.

This section as rewritten by Session Laws 1977, c. 791, contains the correct version of the statute. Opinion of Attorney General to Major

D.R. Emory, N.C. State Highway Patrol, 47 N.C.A.G. 75 (1977).

ARTICLE 9A.

*Motor Vehicle Safety and Financial Responsibility Act of 1953.***§ 20-279.1. Definitions.**

Editor's Note. —

For comment, "Compulsory Motor Vehicle Liability Insurance: Joinder of Insurers as

Defendants in Actions Arising out of Automobile Accidents," see 14 Wake Forest L. Rev. 200 (1978).

§ 20-279.15. Payment sufficient to satisfy requirements.

Coverage Extends to Property Damage as Well as Personal Injuries. — Under subdivision (3) of this section, coverage within this Article extends to property damage as well as to personal damages occurring to the victim of an accident. *Nationwide Mut. Ins. Co. v. Knight*, 34 N.C. App. 96, 237 S.E.2d 341, cert. denied, 293 N.C. 589, 239 S.E.2d 263 (1977).

Property Damage from Intentional Ramming of Defendant's Car. — An automobile insurer was required to compensate defendant for any property damage arising out of the intentional ramming of defendant's automobile by the insured. *Nationwide Mut. Ins. Co. v. Knight*, 34 N.C. App. 96, 237 S.E.2d 341, cert. denied, 293 N.C. 589, 239 S.E.2d 263 (1977).

§ 20-279.21. "Motor vehicle liability policy" defined.

I. GENERAL CONSIDERATION.

Editor's Note. —

For survey of 1973 case law with regard to the construction of the omnibus clause, see 52 N.C.L. Rev. 809 (1974).

The manifest purpose, etc. —

The mandatory coverage required by this article is solely for the protection of innocent victims who may be injured by financially irresponsible motorists. *Nationwide Mut. Ins. Co. v. Chantos*, 293 N.C. 431, 238 S.E.2d 597 (1977).

The provisions of this section are written into every policy, etc. —

The provisions of the Financial Responsibility Act are "written" into every automobile liability policy as a matter of law, and, when the terms of the policy conflict with the statute, the provisions of the statute will prevail. *Nationwide Mut. Ins. Co. v. Chantos*, 293 N.C. 431, 238 S.E.2d 597 (1977).

Statute Applies to All Financially Irresponsible Persons, Including Minors. —

The language of the Financial Responsibility Act leaves no doubt that the legislature intended to make all financially irresponsible persons, including minors, subject to its provisions. *Nationwide Mut. Ins. Co. v. Chantos*, 293 N.C. 431, 238 S.E.2d 597 (1977).

Insurer Is Liable for Property Damage Intentionally Inflicted by Insured. — An automobile insurer in this state is liable, within the maximum coverage required by this article, for property damage caused by an insured who intentionally drives an automobile into plaintiff's property. *Nationwide Mut. Ins. Co. v. Knight*, 34 N.C. App. 96, 237 S.E.2d 341, cert. denied, 293 N.C. 589, 239 S.E.2d 263 (1977).

An automobile insurer was required to compensate defendant for any property damage arising out of the intentional ramming of defendant's automobile by the insured. *Nationwide Mut. Ins. Co. v. Knight*, 34 N.C. App. 96, 237 S.E.2d 341, cert. denied, 293 N.C. 589, 239 S.E.2d 263 (1977).

A wound caused by gunshots fired from the insured's moving automobile did not constitute an accident arising out of the ownership, maintenance or use of such automobile. *Nationwide Mut. Ins. Co. v. Knight*, 34 N.C. App. 96, 237 S.E.2d 341, cert. denied, 293 N.C. 589, 239 S.E.2d 263 (1977).

There was no causal relationship between the ownership, maintenance and use of the insured's moving vehicle, and the injury sustained by the minor defendant as a result of gunshots fired from that moving vehicle. *Nationwide Mut. Ins. Co. v. Knight*, 34 N.C. App. 96, 237 S.E.2d 341, cert. denied, 293 N.C. 589, 239 S.E.2d 263 (1977).

Medical Payment Coverage. — The

mandatory coverage required by this Article does not require the insurer to extend medical payment coverage beyond the terms of the policy to one who receives liability coverage solely by virtue of the Article. *Nationwide Mut. Ins. Co. v. Chantos*, 293 N.C. 431, 238 S.E.2d 597 (1977).

Settlement of Claims by Insurer. —

When exercised in good faith, subdivision (f)(3) of this section, authorizing the insurer to negotiate and settle claims, is valid and binding on the insured. *Nationwide Mut. Ins. Co. v. Chantos*, 293 N.C. 431, 238 S.E.2d 597 (1977).

An insurer may have reimbursement from a stranger to the insurance contract whose negligence caused the injuries and damages for which the insurer had paid as a result of liability imposed by statute. *Nationwide Mut. Ins. Co. v. Chantos*, 293 N.C. 431, 238 S.E.2d 597 (1977).

Policy Provision for Reimbursement by Insured. — Subsection (h) of this section does not compel reimbursement by the insured, it merely allows the insurer and the insured to enter into such an agreement. *Nationwide Mut. Ins. Co. v. Chantos*, 293 N.C. 431, 238 S.E.2d 597 (1977).

A policy provision providing for reimbursement by the insured is merely a contractual agreement between the parties to the policy and does not have the effect or force of a statute. *Nationwide Mut. Ins. Co. v. Chantos*, 293 N.C. 431, 238 S.E.2d 597 (1977).

Provision Requiring Forwarding of Suit Papers Is Valid. — Policy provisions in an insurance contract requiring prompt forwarding of legal process as a condition precedent to recovery on the policy are valid so long as they do not conflict with this article. *Rose Hill Poultry Corp. v. American Mut. Ins. Co.*, 34 N.C. App. 224, 237 S.E.2d 564 (1977).

Effect of Failure to Forward Suit Papers. — The insured's failure under the terms of a policy to forward suit papers or otherwise notify the insurer of an action instituted in another state by an injured third party did not defeat or void the insurer's liability under the policy with respect to the third party; however, it did relieve the insurer of its obligations under the policy to afford protection for the insured. The insured was not the innocent victim this Article was designed to protect, and thus the provision requiring forwarding of legal process was not in conflict with the purpose of this Article. *Rose Hill Poultry Corp. v. American Mut. Ins. Co.*, 34 N.C. App. 224, 237 S.E.2d 564 (1977).

Applied in Ford Marketing Corp. v. National Grange Mut. Ins. Co., 33 N.C. App. 297, 235 S.E.2d 82 (1977).

III. UNINSURED MOTORIST COVERAGE.

Purpose, etc. —

The uninsured motorist provision of this section was enacted in order to close “gaps” in the motor vehicle financial responsibility legislation and thus, to provide financial recompense to innocent persons who receive injuries through the wrongful conduct of motorists who are uninsured and financially irresponsible. *Autry v. Aetna Life & Cas. Ins. Co.*, 35 N.C. App. 628, 242 S.E.2d 172 (1978).

The term “uninsured motor vehicle” in subdivision (b)(3) of this section is intended to include motor vehicles which should be insured under this Article but are not, and motor vehicles

which, though not subject to compulsory insurance under this Article, are at some time operated on the public highways. *Autry v. Aetna Life & Cas. Ins. Co.*, 35 N.C. App. 628, 242 S.E.2d 172 (1978).

No Coverage of Injury on Private Property by Vehicle Not Subject to Financial Responsibility Law. — The uninsured motorist provision was not intended to provide financial recompense to one injured on private property by a vehicle not subject to the registration and compulsory insurance provisions of the motor vehicle financial responsibility legislation. *Autry v. Aetna Life & Cas. Ins. Co.*, 35 N.C. App. 628, 242 S.E.2d 172 (1978).

ARTICLE 11.

Liability Insurance Required of Persons Engaged in Renting Motor Vehicles.

§ 20-281. Liability insurance prerequisite to engaging in business; coverage of policy.

Cited in *Travelers Ins. Co. v. Ryder Truck Rental, Inc.*, 34 N.C. App. 379, 238 S.E.2d 193 (1977).

Chapter 22.

Contracts Requiring Writing.

§ 22-1. Contracts charging representative personally; promise to answer for debt of another.

I. IN GENERAL.

Editor's Note. —

For note discussing the application of the main

purpose rule in the statute of frauds, see 54 N.C.L. Rev. 117 (1975).

§ 22-2. Contract for sale of land; leases.

I. IN GENERAL.

Editor's Note. —

For note on the sufficiency of a will as a memorandum for purposes of the statute of frauds, see 54 N.C.L. Rev. 976 (1976).

III. SUFFICIENCY OF COMPLIANCE WITH SECTION.

A. In General.

No special form or instrument, etc. —

A memorandum, by its very nature, is an informal instrument, and the statute of frauds does not require that it be in any particular form. *Hurdle v. White*, 34 N.C. App. 644, 239 S.E.2d 589 (1977).

A check can be a sufficient memorandum, provided it contains expressly or by necessary implication the essential elements of an agreement to sell. *Hurdle v. White*, 34 N.C. App. 644, 239 S.E.2d 589 (1977).

Essential elements of an agreement to sell include a designation of the vendor, the vendee, the purchase price, and a description of the land, the subject-matter of the contract, either certain in itself or capable of being reduced to certainty by reference to something extrinsic to which the contract refers. *Hurdle v. White*, 34 N.C. App.

644, 239 S.E.2d 589 (1977).

Statement of Time for Performance, etc. —

Omission from the memorandum of time of performance is not fatal. Where no time of performance is stated, the law implies that the option must be exercised within a reasonable time. *Hurdle v. White*, 34 N.C. App. 644, 239 S.E.2d 589 (1977).

Omission from the memorandum of the manner of payment is not fatal. Where the contract fails to specify the manner and form of payment, the contract is construed to require payment to be made in cash simultaneously with tender or delivery of the deed. *Hurdle v. White*, 34 N.C. App. 644, 239 S.E.2d 589 (1977).

Sufficiency of Description. —

The designation of a tract of land by its popular name is sufficient under the statute of frauds to permit the introduction of extrinsic evidence to identify the particular tract intended. *Hurdle v. White*, 34 N.C. App. 644, 239 S.E.2d 589 (1977).

Statement of Price Not Always Required. —

Where the vendor is the party to be charged, the statute of frauds does not require that the price be stated in writing. *Hurdle v. White*, 34 N.C. App. 644, 239 S.E.2d 589 (1977).

Chapter 24.**Interest.****ARTICLE 1.****General Provisions.****§ 24-1.1A. Contract rates on home loans secured by first mortgages or first deeds of trust.****Editor's Note. —**

For a note on the operation of a due-on-sale clause in a deed of trust to allow a lender to exact

higher interest rates from the grantee of a mortgagor, see 13 Wake Forest L. Rev. 490 (1977).

§ 24-5. Contracts, except penal bonds, and judgments to bear interest; jury to distinguish principal.

Cited in Hyde v. Land-Of-Sky Regional Council, 572 F.2d 988 (4th Cir. 1978).

§ 24-10. Maximum fees on loans secured by real property.**Editor's Note. —**

For a note on the operation of a due-on-sale clause in a deed of trust to allow a lender to exact

higher interest rates from the grantee of a mortgagor, see 13 Wake Forest L. Rev. 490 (1977).

§ 24-11. Certain revolving credit charges.**Editor's Note. —**

For survey of 1976 case law on insurance, see 55 N.C.L. Rev. 1052 (1977).

Chapter 25.**Uniform Commercial Code.****ARTICLE 1.***General Provisions.***PART 1.****SHORT TITLE, CONSTRUCTION, APPLICATION AND SUBJECT MATTER OF THE ACT.****§ 25-1-106. Remedies to be liberally administered.**

Quoted in North Carolina Nat'l Bank v. Sharpe, 35 N.C. App. 404, 241 S.E.2d 360 (1978).

PART 2.**GENERAL DEFINITIONS AND PRINCIPLES OF INTERPRETATION.****§ 25-1-201. General definitions.****Editor's Note. —**

For a note on consignments and the consignor's duty to satisfy public notice requirements, see 13 Wake Forest L. Rev. 507 (1977).

Good faith ("honesty in fact") and "notice," although not synonymous, are inherently intertwined. Therefore, the relation between the two cannot be ignored. Branch Banking & Trust Co. v. Gill, 293 N.C. 164, 237 S.E.2d 21 (1977).

The same facts which call a party's "good faith" into question may also give him "notice

of a defense." Branch Banking & Trust Co. v. Gill, 293 N.C. 164, 237 S.E.2d 21 (1977).

Albeit "good faith" is literally defined as "honesty in fact in the conduct or transaction concerned," the Uniform Commercial Code does not permit parties to intentionally keep themselves in ignorance of facts which, if known, would defeat their rights in a negotiable document of title. Branch Banking & Trust Co. v. Gill, 293 N.C. 164, 237 S.E.2d 21 (1977).

Applied in Smathers v. Smathers, 34 N.C. App. 724, 239 S.E.2d 637 (1977).

§ 25-1-208. Option to accelerate at will.

Editor's Note. — For a note on the operation of a due-on-sale clause in a deed of trust to allow a lender to exact higher interest rates from the

grantee of a mortgagor, see 13 Wake Forest L. Rev. 490 (1977).

ARTICLE 2.*Sales.***PART 1.****SHORT TITLE, GENERAL CONSTRUCTION AND SUBJECT MATTER.****§ 25-2-102. Scope; certain security and other transactions excluded from this article.**

Editor's Note. — For survey of 1974 case law on the applicability of the Uniform Commercial

Code to the sale of a business, see 53 N.C.L. Rev. 1097 (1975).

§ 25-2-104. Definitions: "Merchant"; "between merchants"; "financing agency."

Editor's Note. — For survey of 1976 case law on commercial law, see 55 N.C.L. Rev. 943 (1977).

§ 25-2-105. Definitions: Transferability; “goods”; “future” goods; “lot”; “commercial unit.”

Editor's Note. — For note discussing liquidated damages, specific performance and other remedies for breach of cotton sales contracts, see 53 N.C.L. Rev. 579 (1974).

For survey of 1974 case law on the applicability of the Uniform Commercial Code to the sale of a business, see 53 N.C.L. Rev. 1097 (1975).

PART 3.

GENERAL OBLIGATION AND CONSTRUCTION OF CONTRACT.

§ 25-2-302. Unconscionable contract or clause.

Editor's Note. —

For note on strict liability for breach of warranty, see 50 N.C.L. Rev. 697 (1972).

§ 25-2-313. Express warranties by affirmation, promise, description, sample.

Editor's Note. — For note on strict liability for breach of warranty, see 50 N.C.L. Rev. 697 (1972).

For comment on the liability of the bailor for hire for personal injuries caused by defective goods, see 51 N.C.L. Rev. 786 (1973).

§ 25-2-314. Implied warranty: Merchantability; usage of trade.

Editor's Note. — For comment on the liability of the bailor for hire for personal injuries caused by defective goods, see 51 N.C.L. Rev. 786 (1973).

For survey of 1972 case law on recovery for

personal injury under implied warranty, see 51 N.C.L. Rev. 1159 (1973).

For survey of 1976 case law on commercial law, see 55 N.C.L. Rev. 943 (1977).

§ 25-2-315. Implied warranty: Fitness for particular purpose.

Editor's Note. — For comment on the liability of the bailor for hire for personal injuries caused

by defective goods, see 51 N.C.L. Rev. 786 (1973).

§ 25-2-316. Exclusion or modification of warranties.

Editor's Note. — For note on strict liability for breach of warranty, see 50 N.C.L. Rev. 697 (1972).

For survey of 1972 case law on recovery for personal injury under implied warranty, see 51 N.C.L. Rev. 1159 (1973).

For comment on the liability of the bailor for hire for personal injuries caused by defective

goods, see 51 N.C.L. Rev. 786 (1973).

For survey of 1976 case law on commercial law, see 55 N.C.L. Rev. 943 (1977).

Applied in *Bentley Mach., Inc. v. Pons Hosiery, Inc.*, 33 N.C. App. 482, 235 S.E.2d 790 (1977).

Cited in *Isaacson v. Toyota Motor Sales, U.S.A., Inc.*, 438 F. Supp. 1 (E.D.N.C. 1976).

§ 25-2-318. Third party beneficiaries of warranties express or implied.

Editor's Note. —

For comment on the liability of the bailor for hire for personal injuries caused by defective goods, see 51 N.C.L. Rev. 786 (1973).

For survey of 1972 case law on recovery for personal injury under implied warranty, see 51 N.C.L. Rev. 1159 (1973).

§ 25-2-326. Sale on approval and sale or return; consignment sales and rights of creditors.

Editor's Note. — For a note on consignments and the consignor's duty to satisfy public notice requirements, see 13 Wake Forest L. Rev. 507 (1977).

PART 4.**TITLE, CREDITORS AND GOOD FAITH PURCHASES.****§ 25-2-403. Power to transfer; good faith purchase of goods; "entrusting."**

Editor's Note. — For article, "The Contracts of Minors Viewed from the Perspective of Fair Exchange," see 50 N.C.L. Rev. 517 (1972).

PART 6.**BREACH, REPUDIATION AND EXCUSE.****§ 25-2-608. Revocation of acceptance in whole or in part.**

Editor's Note. — For survey of 1972 case law on revocation of acceptance, see 51 N.C.L. Rev. 1170 (1978).

§ 25-2-610. Anticipatory repudiation.

Editor's Note. — For note discussing the measure of buyer's damages upon anticipatory repudiation, see 56 N.C.L. Rev. 370 (1978).

§ 25-2-615. Excuse by failure of presupposed conditions.

Editor's Note. — For article discussing judicial reallocation of contractual risks under this section, see 54 N.C.L. Rev. 545 (1976).

PART 7.**REMEDIES.****§ 25-2-712. "Cover"; buyer's procurement of substitute goods.**

Editor's Note. — For note discussing the measure of buyer's damages upon anticipatory repudiation, see 56 N.C.L. Rev. 370 (1978).

§ 25-2-713. Buyer's damages for nondelivery or repudiation.

Editor's Note. — For note discussing the measure of buyer's damages upon anticipatory repudiation, see 56 N.C.L. Rev. 370 (1978).

§ 25-2-715. Buyer's incidental and consequential damages.

Editor's Note. — For note discussing the measure of buyer's damages upon anticipatory repudiation, see 56 N.C.L. Rev. 370 (1978).

§ 25-2-716. Buyer's right to specific performance or replevin.

Editor's Note. —
For note discussing liquidated damages, specific performance and other remedies for

breach of cotton sales contracts, see 53 N.C.L. Rev. 579 (1974).

§ 25-2-719. Contractual modification or limitation of remedy.

Editor's Note. — For note on strict liability for breach of warranty, see 50 N.C.L. Rev. 697 (1972).

For comment on the liability of the bailor for hire for personal injuries caused by defective goods, see 51 N.C.L. Rev. 786 (1973).

For note discussing liquidated damages, specific performance and other remedies for breach of cotton sales contracts, see 53 N.C.L. Rev. 579 (1974).

§ 25-2-723. Proof of market price; time and place.

Editor's Note. —
For note discussing the measure of buyer's

damages upon anticipatory repudiation, see 56 N.C.L. Rev. 370 (1978).

§ 25-2-725. Statute of limitations in contracts for sale.

Editor's Note. —
For comment on the liability of the bailor for

hire for personal injuries caused by defective goods, see 51 N.C.L. Rev. 786 (1973).

ARTICLE 3.***Commercial Paper.*****PART 1.****SHORT TITLE, FORM AND INTERPRETATION.****§ 25-3-104. Form of negotiable instruments; "draft"; "check"; "certificate of deposit"; "note."**

The full tests for determining whether a particular instrument is a negotiable instrument under this article can be determined only by reading §§ 25-3-104 through 25-3-112 as a unit. Booker v. Everhart, 294 N.C. 146, 240 S.E.2d 360 (1978).

As Does Condition. —

Under the law of this state prior to the adoption of the Uniform Commercial Code, it was clearly established that a conditional promise or contingent condition contained in the instrument itself had the effect of defeating the

negotiability of the instrument. This prior law is carried forward in subsection (1)(b). Booker v. Everhart, 294 N.C. 146, 240 S.E.2d 360 (1978).

Note Not Payable to Order or Bearer, etc. —

Under old law of commercial paper and now incorporated into the Uniform Commercial Code, a note payable neither to order nor to bearer is not negotiable. Gray v. American Express Co., 34 N.C. App. 714, 239 S.E.2d 621 (1977).

Specificity on the face of the negotiable instrument is required whether payment be to order or to bearer. Gray v. American Express

Co., 34 N.C. App. 714, 239 S.E.2d 621 (1977).

A traveler's check is a negotiable instrument within the purview of this article. Gray v.

American Express Co., 34 N.C. App. 714, 239 S.E.2d 621 (1977).

§ 25-3-105. When promise or order unconditional.

Reference to Separate Agreement. — Under subsections (1)(b) and (c), it is clear that mere reference in a note to the separate agreement or document out of which the note arises does not affect the negotiability of the note. But to go beyond a reference to the separate agreement, by incorporating the terms of that agreement into the note, makes the note "subject to or governed by" that agreement, and thus, under

subsection (2)(a), renders the promise conditional and the note nonnegotiable. Booker v. Everhart, 294 N.C. 146, 240 S.E.2d 360 (1978).

When the instrument itself makes express reference to an outside agreement, transaction or document, the effect on the negotiability of the instrument will depend on the nature of the reference. Booker v. Everhart, 294 N.C. 146, 240 S.E.2d 360 (1978).

§ 25-3-111. Payable to bearer.

Specificity on the face of the negotiable instrument is required whether payment be to

order or to bearer. Gray v. American Express Co., 34 N.C. App. 714, 239 S.E.2d 621 (1977).

§ 25-3-112. Terms and omissions not affecting negotiability.

The full tests for determining whether a particular instrument is a negotiable instrument under this article can be determined only by reading §§ 25-3-104 through 25-3-112 as a unit. Booker v. Everhart, 294 N.C. 146, 240 S.E.2d 360 (1978).

The payee's name is not one of the terms and omissions not affecting negotiability under this section. Gray v. American Express Co., 34 N.C. App. 714, 239 S.E.2d 621 (1977).

§ 25-3-114. Date, antedating, postdating.

Stated in Gray v. American Express Co., 34 N.C. App. 714, 239 S.E.2d 621 (1977).

§ 25-3-115. Incomplete instruments.

The name of the payee is an essential element. Gray v. American Express Co., 34 N.C. App. 714, 239 S.E.2d 621 (1977).

Dating is not a necessary element, the absence of which makes the instrument incomplete and unenforceable under this section. Gray v. American Express Co., 34 N.C. App. 714, 239 S.E.2d 621 (1977).

Travelers checks which were not dated and did not bear the name of the payee remained incomplete and unenforceable as a matter of law, where plaintiff had the authority to complete the instruments, had nine years to do so, and did not. Gray v. American Express Co., 34 N.C. App. 714, 239 S.E.2d 621 (1977).

§ 25-3-120. Instruments "payable through" bank.

Stated in North Carolina Nat'l Bank v. McCarley & Co., 34 N.C. App. 689, 239 S.E.2d 583 (1977).

PART 2.

TRANSFER AND NEGOTIATION.

§ 25-3-201. Transfer; right to indorsement.

Applied in *Smathers v. Smathers*, 34 N.C. App. 724, 239 S.E.2d 637 (1977).

§ 25-3-205. Restrictive indorsements.

Cited in *Booker v. Everhart*, 294 N.C. 146, 240 S.E.2d 360 (1978).

§ 25-3-206. Effect of restrictive indorsement.

Cited in *Booker v. Everhart*, 294 N.C. 146, 240 S.E.2d 360 (1978).

§ 25-3-207. Negotiation effective although it may be rescinded.

Editor's Note. — For article, "The Contracts of Minors Viewed from the Perspective of Fair Exchange," see 50 N.C.L. Rev. 517 (1972).

PART 3.

RIGHTS OF A HOLDER.

§ 25-3-301. Rights of a holder.

Cited in *Smathers v. Smathers*, 34 N.C. App. 724, 239 S.E.2d 637 (1977); *Booker v. Everhart*, 294 N.C. 146, 240 S.E.2d 360 (1978).

§ 25-3-305. Rights of a holder in due course.

Editor's Note. —
For article, "The Contracts of Minors Viewed from the Perspective of Fair Exchange," see 50 N.C.L. Rev. 517 (1972).

Applied in *Ralph Stachon & Assocs. v. Greenville Broadcasting Co.*, 35 N.C. App. 540, 241 S.E.2d 884 (1978).

§ 25-3-306. Rights of one not holder in due course.

Applied in *Ralph Stachon & Assocs. v. Greenville Broadcasting Co.*, 35 N.C. App. 540, 241 S.E.2d 884 (1978).

PART 4.

LIABILITY OF PARTIES.

§ 25-3-403. Signature by authorized representative.

Editor's Note. — For survey of 1976 case law on commercial law, see 55 N.C.L. Rev. 943 (1977).

§ 25-3-408. Consideration.

Applied in *Ralph Stachon & Assocs. v. Greenville Broadcasting Co.*, 35 N.C. App. 540, 241 S.E.2d 884 (1978).

§ 25-3-414. Contract of indorser; order of liability.

Editor's Note. — For survey of 1976 case law on commercial law, see 55 N.C.L. Rev. 943 (1977).

§ 25-3-419. Conversion of instrument; innocent representative.

Quoted in *North Carolina Nat'l Bank v. McCarley & Co.*, 34 N.C. App. 689, 239 S.E.2d 583 (1977).

ARTICLE 4.*Bank Deposits and Collections.***PART 4.****RELATIONSHIP BETWEEN PAYOR BANK AND ITS CUSTOMER.****§ 25-4-403. Customer's right to stop payment; burden of proof of loss.**

Amount of Loss Must Be More than Mere Debiting of Bank Account. — Where the bank pleads nonloss by the bank customer, a bank customer, in order to recover for damages caused by the bank's payment of a check contrary to a valid stop payment order, must show some loss other than the mere debiting of his bank account in the amount of the check. *Mitchell v. Republic Bank & Trust Co.*, 35 N.C. App. 101, 239 S.E.2d 867 (1978).

Burden of Proof. — A prima facie case of loss

is established by the customer when he shows that the bank paid a check contrary to a valid stop payment order. Then the bank, exercising its subrogation rights created by § 25-4-407, has the burden of coming forward and presenting evidence of an absence of actual loss sustained by the customer. When the bank meets the burden of coming forward, the customer must sustain the ultimate burden of proving loss. *Mitchell v. Republic Bank & Trust Co.*, 35 N.C. App. 101, 239 S.E.2d 867 (1978).

§ 25-4-407. Payor bank's right to subrogation on improper payment.

Applied in *Mitchell v. Republic Bank & Trust Co.*, 35 N.C. App. 101, 239 S.E.2d 867 (1978).

ARTICLE 7.*Warehouse Receipts, Bill of Lading and Other Documents of Title.***PART 1.****GENERAL.****§ 25-7-102. Definitions and index of definitions.**

Warehouseman Bears Risk that Agent May Issue Improper Receipts. — Section 25-7-203, coupled with the definition of issuer under (1)(g)

of this section, clearly places upon the warehouseman the risk that his agent may fraudulently or mistakenly issue improper

receipts. The theory of the law is that the warehouseman, being in the best position to prevent the issuance of mistaken or fraudulent receipts, should be obligated to do so; that such

receipts are a risk and cost of the business enterprise which the issuer is best able to absorb. *Branch Banking & Trust Co. v. Gill*, 293 N.C. 164, 237 S.E.2d 21 (1977).

§ 25-7-104. Negotiable and nonnegotiable warehouse receipt, bill of lading or other document of title.

Applied in *Branch Banking & Trust Co. v. Gill*, 293 N.C. 164, 237 S.E.2d 21 (1977).

PART 2.

WAREHOUSE RECEIPTS: SPECIAL PROVISIONS.

§ 25-7-203. Liability for non-receipt or misdescription.

Applicability of Section. — This section covers the situation where the sole question is: Under what circumstances and to whom is an issuer liable for the issuance of warehouse receipts when it has not received the goods which the receipts purportedly cover? *Branch Banking & Trust Co. v. Gill*, 293 N.C. 164, 237 S.E.2d 21 (1977).

The purpose of this section is to protect specified parties to or purchasers of warehouse receipts by imposing liability upon the warehouseman when either he or his agent fraudulently or mistakenly issues receipts (negotiable or nonnegotiable) for misdescribed or nonexistent goods. *Branch Banking & Trust Co. v. Gill*, 293 N.C. 164, 237 S.E.2d 21 (1977).

Parties May Not Keep Themselves in Ignorance of Facts. — Albeit "good faith" is literally defined as "honesty in fact in the conduct or transaction concerned," the Uniform Commercial Code does not permit parties to intentionally keep themselves in ignorance of facts which, if known, would defeat their rights in a negotiable document of title. *Branch Banking & Trust Co. v. Gill*, 293 N.C. 164, 237 S.E.2d 21 (1977).

No Requirement to Take Documents through "Due Negotiation". — This section contains no requirement that the purchaser take negotiable documents through "due negotiation" before he can recover from the

issuer. *Branch Banking & Trust Co. v. Gill*, 293 N.C. 164, 237 S.E.2d 21 (1977).

Warehouseman Bears Risk that Agent May Issue Improper Receipts. — This section, coupled with the definition of issuer under § 25-7-102 (1)(g), clearly places upon the warehouseman the risk that his agent may fraudulently or mistakenly issue improper receipts. The theory of the law is that the warehouseman, being in the best position to prevent the issuance of mistaken or fraudulent receipts, should be obligated to do so; that such receipts are a risk and cost of the business enterprise which the issuer is best able to absorb. *Branch Banking & Trust Co. v. Gill*, 293 N.C. 164, 237 S.E.2d 21 (1977).

Claimant's Burden of Proof. — To be entitled to recover under this section, claimant has the burden of proving that he: (1) is a party to or purchaser of a document of title other than a bill of lading; (2) gave value for the document; (3) took the document in good faith; (4) relied to his detriment upon the description of the goods in the document; and (5) took without notice that the goods were misdescribed or were never received by the issuer. Many of these terms are defined in § 25-1-201 and those definitions are also made applicable to Article 7, § 25-7-102(4). *Branch Banking & Trust Co. v. Gill*, 293 N.C. 164, 237 S.E.2d 21 (1977).

PART 3.

BILLS OF LADING: SPECIAL PROVISIONS.

§ 25-7-301. Liability for non-receipt or misdescription; "said to contain"; "shipper's load and count"; improper handling.

Quoted in *Branch Banking & Trust Co. v. Gill*, 293 N.C. 164, 237 S.E.2d 21 (1977).

PART 5.

WAREHOUSE RECEIPTS AND BILLS OF LADING: NEGOTIATION AND TRANSFER.

§ 25-7-501. Form of negotiation and requirements of “due negotiation.”

Applied in *Branch Banking & Trust Co. v. Gill*, 293 N.C. 164, 237 S.E.2d 21 (1977).

§ 25-7-502. Rights acquired by due negotiation.

Determining Priority of Claims. — In situations where there are actual goods, and there are conflicting claims either to them or to the documents, this section and §§ 25-7-503 and 25-7-504 determine the priority of these claims. *Branch Banking & Trust Co. v. Gill*, 293 N.C. 164, 237 S.E.2d 21 (1977).

For hypothetical examples of the manner in which this section and § 25-7-504 are intended to work in determining the priorities of competing claims, see *Branch Banking & Trust Co. v. Gill*, 293 N.C. 164, 237 S.E.2d 21 (1977).

The primary purpose of this section and § 25-7-504 is to determine the priority of

competing claims to valid documents and goods actually stored in a warehouse and to determine the issuer's liability for a misdelivery of goods actually received by it. *Branch Banking & Trust Co. v. Gill*, 293 N.C. 164, 237 S.E.2d 21 (1977).

Generally, a holder of negotiable warehouse receipts acquired through “due negotiation” will receive paramount title not only to the documents but also to the goods represented by them, the purpose of Uniform Commercial Code, Article 7, Part 5, being to facilitate the negotiability and integrity of negotiable receipts. *Branch Banking & Trust Co. v. Gill*, 293 N.C. 164, 237 S.E.2d 21 (1977).

§ 25-7-503. Document of title to goods defeated in certain cases.

Determining Priority of Claims. — In situations where there are actual goods, and there are conflicting claims either to them or to the documents, §§ 25-7-502 through 25-7-504

determine the priority of these claims. *Branch Banking & Trust Co. v. Gill*, 293 N.C. 164, 237 S.E.2d 21 (1977).

§ 25-7-504. Rights acquired in the absence of due negotiations; effect of diversion; seller's stoppage of delivery.

Determining Priority of Claims. — In situations where there are actual goods, and there are conflicting claims either to them or to the documents, §§ 25-7-502 through 25-7-504 determine the priority of these claims. *Branch Banking & Trust Co. v. Gill*, 293 N.C. 164, 237 S.E.2d 21 (1977).

For hypothetical examples of the manner in which this section and § 25-7-502 are intended to work in determining the priorities of competing claims, see *Branch Banking & Trust Co. v. Gill*, 293 N.C. 164, 237 S.E.2d 21 (1977).

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Generally, a holder of negotiable warehouse receipts acquired through “due negotiation” will receive paramount title not only to the documents but also to the goods represented by them, the purpose of Uniform Commercial Code, Article 7, Part 5, being to facilitate the negotiability and integrity of negotiable receipts. *Branch Banking & Trust Co. v. Gill*, 293 N.C. 164, 237 S.E.2d 21 (1977).

§ 25-7-506. Delivery without indorsement; right to compel indorsement.

Applied in *Branch Banking & Trust Co. v. Gill*, 293 N.C. 164, 237 S.E.2d 21 (1977).

ARTICLE 8.

Investment Securities.

PART 3.

PURCHASE.

§ 25-8-311. Effect of unauthorized indorsement.

No Right of Action Against Broker. — While Article 8 confers on the true owner of securities which have been transferred upon an unauthorized endorsement, remedies against the issuer in this section and against the ultimate purchaser in § 25-8-315 and subsection (a) of this

section, it does not appear that Article 8 provides any right of action in favor of the owner against the broker who consummated the transfer. *North Carolina Nat'l Bank v. McCarley & Co.*, 34 N.C. App. 689, 239 S.E.2d 583 (1977).

§ 25-8-315. Action against purchaser based upon wrongful transfer.

No Right of Action Against Broker. — While Article 8 confers on the true owner of securities which have been transferred upon an unauthorized endorsement, remedies against the issuer in § 25-8-311, and against the ultimate purchaser in this section and § 25-8-311(a), it

does not appear that Article 8 provides any right of action in favor of the owner against the broker who consummated the transfer. *North Carolina Nat'l Bank v. McCarley & Co.*, 34 N.C. App. 689, 239 S.E.2d 583 (1977).

§ 25-8-318. No conversion by good faith delivery.

Defendant Has Burden to Present Evidence of Good Faith. — While this section purports to protect a broker who transfers securities at the insistence of a principal who has no right to dispose of them, its protection is only available as a defense with the burden on the defendant

to present evidence that it acted in good faith and in accordance with reasonable commercial standards. *North Carolina Nat'l Bank v. McCarley & Co.*, 34 N.C. App. 689, 239 S.E.2d 583 (1977).

ARTICLE 9.

Secured Transactions; Sales of Accounts and Chattel Paper.

PART 1.

SHORT TITLE, APPLICABILITY AND DEFINITIONS.

§ 25-9-102. Policy and subject matter of article.**Editor's Note.** —

For a note on consignments and the consignor's duty to satisfy public notice

requirements, see 13 Wake Forest L. Rev. 507 (1977).

§ 25-9-104. Transactions excluded from article.

Cross Reference. — As to application of Article 9 of the North Carolina Uniform Commercial Code to transactions under Chapter

159D, the North Carolina Industrial and Pollution Control Facilities Federal Program Financing Act, see § 159D-23.

§ 25-9-114. Consignment.**Editor's Note.** —

For a note on consignments and the consignor's duty to satisfy public notice

requirements, see 13 Wake Forest L. Rev. 507 (1977).

PART 2.

VALIDITY OF SECURITY AGREEMENT AND RIGHTS OF PARTIES THERETO.

§ 25-9-203. Attachment and enforceability of security interest; proceeds; formal requisites.**Editor's Note. —**

For a note on consignments and the consignor's duty to satisfy public notice

requirements, see 13 Wake Forest L. Rev. 507 (1977).

§ 25-9-204. After-acquired property; future advances.**Editor's Note. —**

For a note on consignments and the consignor's duty to satisfy public notice requirements, see 13 Wake Forest L. Rev. 507 (1977).

Cited in *In re Dickson*, 432 F. Supp. 752 (W.D.N.C. 1977).

§ 25-9-207. Rights and duties when collateral is in secured party's possession.

Obligation Not Applicable until Right of Possession Exercised. — The obligations of the secured party to secure and protect the collateral as required by this section are not

applicable unless and until the party has exercised his right of possession. *North Carolina Nat'l Bank v. Sharpe*, 35 N.C. 404, 241 S.E.2d 360 (1978).

PART 3.

RIGHTS OF THIRD PARTIES; PERFECTED AND UNPERFECTED SECURITY INTERESTS; RULES OF PRIORITY.

§ 25-9-302. When filing is required to perfect security interest; security interests to which filing provisions of this article do not apply.

Cross Reference. — As to application of Article 9 of the North Carolina Uniform Commercial Code to transactions under Chapter 159D, the North Carolina Industrial and Pollution Control Facilities Federal Program Financing Act, see § 159D-23.

Editor's Note. —

For a note on consignments and the consignor's duty to satisfy public notice requirements, see 13 Wake Forest L. Rev. 507 (1977).

§ 25-9-303. When security interest is perfected; continuity of perfection.**Editor's Note. —**

For a note on consignments and the consignor's duty to satisfy public notice

requirements, see 13 Wake Forest L. Rev. 507 (1977).

§ 25-9-307. Protection of buyers of goods.**Editor's Note. —**

For note on the standard of good faith for

merchant buyers under subsection (1) of this section, see 51 N.C.L. Rev. 646 (1973).

PART 4.

FILING.

§ 25-9-401. Place of filing; erroneous filing; removal of collateral.

Editor's Note. —

For survey of 1976 case law on commercial law, see 55 N.C.L. Rev. 943 (1977).

For a note on consignments and the

consignor's duty to satisfy public notice requirements, see 13 Wake Forest L. Rev. 507 (1977).

PART 5.

DEFAULT.

§ 25-9-501. Default; procedure when security agreement covers both real and personal property.

No Obligation to Take Possession upon Demand of Debtor. — The right of the secured party to take possession of the collateral does not impose an obligation to take possession upon

demand of the debtor. North Carolina Nat'l Bank v. Sharpe, 35 N.C. App. 404, 241 S.E.2d 360 (1978).

§ 25-9-503. Secured party's right to take possession after default.

No Obligation to Take Possession upon Demand of Debtor. — The right of the secured party to take possession of the collateral does not impose an obligation to take possession upon

demand of the debtor. North Carolina Nat'l Bank v. Sharpe, 35 N.C. App. 404, 241 S.E.2d 360 (1978).

§ 25-9-504. Secured party's right to dispose of collateral after default; effect of disposition.

Applied in First Union Nat'l Bank v. Tectamar, Inc., 33 N.C. App. 604, 235 S.E.2d 894 (1977).

§ 25-9-507. Secured party's liability for failure to comply with this part.

Applied in First Union Nat'l Bank v. Tectamar, Inc., 33 N.C. App. 604, 235 S.E.2d 894 (1977).

Chapter 25A.

Retail Installment Sales Act.

Sec.

25A-25. Preservation of consumers' claims and defenses.

§ 25A-1. Scope of act.

Editor's Note. — For article discussing the scope of this chapter and its impact on the agreement and performance stages of a

consumer credit transaction, see 50 N.C.L. Rev. 767 (1972).

§ 25A-25. Preservation of consumers' claims and defenses. — (a) In a consumer credit sale, a buyer may assert against the seller, assignee of the seller, or other holder of the instrument or instruments of indebtedness, any claims or defenses available against the original seller, and the buyer may not waive the right to assert these claims or defenses in connection with a consumer credit sales transaction. Affirmative recovery by the buyer on a claim asserted against an assignee of the seller or other holder of the instrument of indebtedness shall not exceed amounts paid by the buyer under the contract.

(b) Every consumer credit sale contract shall contain the following provision in at least ten-point boldface type:

NOTICE

ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

(c) Compliance with the requirements of the Federal Trade Commission rule on preservation of consumer claims and defenses is considered full compliance with this act. (1971, c. 796, s. 1; 1977, c. 921.)

Editor's Note. — The 1977 amendment effective June 30, 1978, deleted "if the debt is secured in whole or in part by a security interest in real property" following "consumer credit sale" in the first sentence of subsection (a), inserted "claims or" preceding "defenses" in two places and "the right to assert" after "buyer may not waive" in the first sentence of

subsection (a), rewrote subsection (b), and added subsection (c).

Because of the postponed effective date of the 1977 amendment, this section as amended was not set out in the text in the 1977 Cumulative Supplement, but was carried in a note. The amended section is therefore set out in this 1978 Interim Supplement.

Chapter 28A.**Administration of Decedents' Estates.****ARTICLE 2.***Jurisdiction for Probate of Wills and Administration of Estates of Decedents.***§ 28A-2-1. Clerk of superior court.**

Editor's Note. — For survey of 1976 case law on wills, trusts and estates, see 55 N.C.L. Rev. 1109 (1977).

ARTICLE 9.*Revocation of Letters.***§ 28A-9-1. Revocation after hearing.****Discretion Reviewable on Appeal. —**

In accord with original. See *In re Will of Taylor*, 293 N.C. 511, 238 S.E.2d 774 (1977).

§ 28A-9-2. Summary revocation.

Cited in *In re Will of Taylor*, 293 N.C. 511, 238 S.E.2d 774 (1977).

ARTICLE 18.*Actions and Proceedings.***§ 28A-18-2. Death by wrongful act of another; recovery not assets.****I. IN GENERAL.****Cross Reference. —**

As to power of personal representative to maintain action for wrongful death and to compromise or settle any such claims, subject to approval of judge of superior court, see § 28A-13-3(23) in the replacement volume.

Editor's Note. —

For survey of 1976 case law on torts, see 55 N.C.L. Rev. 1088 (1977).

For a note on the interaction between North Carolina's wrongful death statute and its statute of limitations for not readily apparent personal injuries or product defects, see 13 Wake Forest L. Rev. 543 (1977).

Cited in *Sadler v. New Hanover Mem. Hosp.*, 432 F. Supp. 604 (E.D.N.C. 1977); *Holt v. City of Statesville*, 35 N.C. App. 381, 241 S.E.2d 362 (1978).

Chapter 29.

Intestate Succession.

ARTICLE 1.

General Provisions.

§ 29-1. Short title.

Purpose of Chapter. — Taken as a whole, this Chapter conveys an intent by the legislature to write a reasonable will for those residents who

have not done so. *Newlin v. Gill*, 293 N.C. 348, 237 S.E.2d 819 (1977).

§ 29-2. Definitions.

Stated in *Phillips v. Phillips*, 34 N.C. App. 428, 238 S.E.2d 790 (1977).

§ 29-7. Collateral succession limited.

Rights of collateral succession are limited to the descendants of the intestate's parents or grandparents. This section limits such succession to those persons who are within five degrees of kinship to the intestate, and the effect of the proviso engrafted upon this section is to provide for unlimited succession by collateral kinsmen descended from the intestate's parents or grandparents in the event there are no collateral kinsmen of the fifth degree in such lines of descent. *Newlin v. Gill*, 293 N.C. 348, 237 S.E.2d 819 (1977).

The limitation upon collateral succession to heirs within five degrees of kinship to the intestate contained in this section is a limitation

upon succession by heirs descended from parents or grandparents of the intestate. *Newlin v. Gill*, 293 N.C. 348, 237 S.E.2d 819 (1977).

Escheats not Eliminated by Proviso of this Section. — This section at most imposes a limitation upon intestate succession, as defined in § 29-15, and by its proviso restates the existing effect of § 29-15, i.e., that collateral descent shall be unlimited when it is within the parentela of an intestate's parents or grandparents. Thus, in enacting this section, the legislature did not intend to eliminate escheats. *Newlin v. Gill*, 293 N.C. 348, 237 S.E.2d 819 (1977).

§ 29-12. Escheats.

Presumption That Distant Relatives Not Included in Will. — Underlying this provision for escheat of the estate in the absence of certain relatives is a logical presumption that the intestate would not have included distant relatives in his will. *Newlin v. Gill*, 293 N.C. 348, 237 S.E.2d 819 (1977).

Effect of § 29-7 as to Escheat, etc. —

Section 29-7 at most imposes a limitation upon

intestate succession, as defined in § 29-15, and by its proviso restates the existing effect of § 29-15, i.e., that collateral descent shall be unlimited when it is within the parentela of an intestate's parents or grandparents. Thus, in enacting § 29-7, the legislature did not intend to eliminate escheats. *Newlin v. Gill*, 293 N.C. 348, 237 S.E.2d 819 (1977).

ARTICLE 2.

Shares of Persons Who Take upon Intestacy.

§ 29-14. Share of surviving spouse.

Words Describing Relationships Bear Ordinary Meanings. — In carefully naming the persons who take in cases of intestacy using words describing family relationships such as

"parents," "brothers," "sisters," "grandparents," "aunts" and "uncles," the legislature intended that these words bear their ordinary and usual meaning. *Newlin v. Gill*, 293

N.C. 348, 237 S.E.2d 819 (1977).

And Cannot Be Expanded. — The words “brother,” “parent” and “grandparent” cannot be expanded to include other relationships such as “great-grandfather” or “great uncle.” Therefore, the maxim, “Expressio unius est exclusio alterius” (the expression of one thing is the exclusion of another) tends to exclude collateral kin who are not in the parentela of the intestate’s parents or grandparents. *Newlin v. Gill*, 293 N.C. 348, 237 S.E.2d 819 (1977).

Distribution of Estate When Surviving Spouse Dissents from Will. — When a surviving spouse dissents from a will, the intestate share should be allocated so as to cause the least possible disruption of the decedent’s plan for the distribution of his estate. In partitioning testatrix’s property, her will should be given consideration, and insofar as possible

the beneficiaries of the will should receive the property testatrix intended for them to receive. *In re Estate of Etheridge*, 33 N.C. App. 585, 235 S.E.2d 924, cert. denied, 293 N.C. 253, 237 S.E.2d 535 (1977).

This section does not purport to give a dissenting spouse the right to select the particular property he or she will receive in opposition to the dominant intent expressed in a will. The dominant intent expressed in the will is still controlling so long as it can be carried out and leave the dissenting spouse with the prescribed fractional interest in value in the estate. *In re Estate of Etheridge*, 33 N.C. App. 585, 235 S.E.2d 924, cert. denied, 293 N.C. 253, 237 S.E.2d 535 (1977).

Stated in *Phillips v. Phillips*, 34 N.C. App. 428, 238 S.E.2d 790 (1977).

§ 29-15. Shares of others than surviving spouse.

Words Describing Relationships Bear Ordinary Meanings. — In carefully naming the persons who take in cases of intestacy using words describing family relationships such as “parents,” “brothers,” “sisters,” “grandparents,” “aunts” and “uncles,” the legislature intended that these words bear their ordinary and usual meaning. *Newlin v. Gill*, 293 N.C. 348, 237 S.E.2d 819 (1977).

And Cannot Be Expanded. — The words “brother,” “parent” and “grandparent” cannot

be expanded to include other relationships such as “great-grandfather” or “great uncle.” Therefore, the maxim “Expressio unius est exclusio alterius” (the expression of one thing is the exclusion of another) tends to exclude collateral kin who are not in the parentela of the intestate’s parents or grandparents. *Newlin v. Gill*, 293 N.C. 348, 237 S.E.2d 819 (1977).

Applied in *Jernigan v. Stokley*, 34 N.C. App. 358, 238 S.E.2d 318 (1977).

ARTICLE 3.

Distribution among Classes.

§ 29-16. Distribution among classes.

Applied in *Jernigan v. Stokley*, 34 N.C. App. 358, 238 S.E.2d 318 (1977).

Cited in *House v. White*, 35 N.C. App. 124, 240 S.E.2d 489 (1978).

ARTICLE 4.

Adopted Children.

§ 29-17. Succession by, through and from adopted children.

Editor’s Note. —

For article, “Recognition of Foreign Judgments,” see 50 N.C.L. Rev. 21 (1971).

ARTICLE 5.

*Legitimated Children.***§ 29-18. Succession by, through and from legitimated children.**

Editor's Note. — For article, "Recognition of Foreign Judgments," see 50 N.C.L. Rev. 21 (1971).

ARTICLE 6.

*Illegitimate Children.***§ 29-21. Share of surviving spouse.**

Words Describing Relationships Bear Ordinary Meanings. — In carefully naming the persons who take in cases of intestacy using words describing family relationships such as "parents," "brothers," "sisters," "grandparents," "aunts" and "uncles," the legislature intended that these words bear their ordinary and usual meaning. *Newlin v. Gill*, 293 N.C. 348, 237 S.E.2d 819 (1977).

And Cannot Be Expanded. — The words

"brother," "parent" and "grandparent" cannot be expanded to include other relationships such as "great-grandfather" or "great uncle." Therefore, the maxim, "Expressio unius est exclusio alterius" (the expression of one thing is the exclusion of another) tends to exclude collateral kin who are not in the parentela of the intestate's parents or grandparents. *Newlin v. Gill*, 293 N.C. 348, 237 S.E.2d 819 (1977).

§ 29-22. Shares of others than the surviving spouse.

Words Describing Relationships Bear Ordinary Meanings. — In carefully naming the persons who take in cases of intestacy using words describing family relationships such as "parents," "brothers," "sisters," "grandparents," "aunts" and "uncles," the legislature intended that these words bear their ordinary and usual meaning. *Newlin v. Gill*, 293 N.C. 348, 237 S.E.2d 819 (1977).

And Cannot Be Expanded. — The words

"brother," "parent" and "grandparent" cannot be expanded to include other relationships such as "great-grandfather" or "great uncle." Therefore, the maxim, "Expressio unius est exclusio alterius" (the expression of one thing is the exclusion of another) tends to exclude collateral kin who are not in the parentela of the intestate's parents or grandparents. *Newlin v. Gill*, 293 N.C. 348, 237 S.E.2d 819 (1977).

Chapter 30.

Surviving Spouses.

ARTICLE 1.

Dissent from Will.

§ 30-1. Right of dissent.

Chapter 29 Governs Intestate Share. — The determination of a surviving spouse's intestate share is governed in the first instance by the "Intestate Succession Act" (Chapter 29 of the General Statutes). *Phillips v. Phillips*, 34 N.C. App. 428, 238 S.E.2d 790 (1977).

Determination Made from Net, Not Gross, Estate. — Subsection (c) does not require intestate share to be determined — for purposes of establishing the right to dissent — from decedent's gross estate valued as of the date of his death rather than from net estate as required by § 29-14(1). *Phillips v. Phillips*, 34 N.C. App. 428, 238 S.E.2d 790 (1977).

In establishing the right of a surviving spouse to dissent pursuant to subsection (a)(1), the determination of intestate share is based on the value of the decedent's net estate as provided in Chapter 29 of the General Statutes. *Phillips v. Phillips*, 34 N.C. App. 428, 238 S.E.2d 790 (1977).

Subsection (c) Used to Determine Aggregate Value. — Only the first figure in the statutory scheme — the "aggregate value" of property passing to the surviving spouse under and outside the will — can be determined pursuant

to subsection (c). The other essential figure — intestate share — can be determined only at such time that "net estate" is ascertainable. *Phillips v. Phillips*, 34 N.C. App. 428, 238 S.E.2d 790 (1977).

Subsection (c) provides a method for determining the value of benefits passing to the surviving spouse under and outside the will of the deceased spouse, which values are used to ascertain the "aggregate value" figure essential to the establishment of the right to dissent. *Phillips v. Phillips*, 34 N.C. App. 428, 238 S.E.2d 790 (1977).

Establishment of Right to Dissent When Spouse And Lineal Descendant Survive. — Where the testator is survived by his spouse and a lineal descendant, the right of the surviving spouse to dissent is established by the determination and comparison of two figures: (1) the aggregate value of property passing under the will and outside the will to the surviving spouse; and (2) the intestate share of the surviving spouse. *Phillips v. Phillips*, 34 N.C. App. 428, 238 S.E.2d 790 (1977).

§ 30-2. Time and manner of dissent.

Filing Procedure Not Determinative of Right to Dissent. — The filing procedure prescribed by subsection (a) is merely a limitation on the time within which a surviving spouse must note her dissent of record. It is not conditioned upon or determinative of the right to dissent which may not be established until some later date. *Phillips v. Phillips*, 34 N.C. App. 428, 238 S.E.2d 790 (1977).

A surviving spouse can and, in fact, must file her dissent within the statutory time period even though her right to dissent is not finally established until after the statutory time period has expired due to the necessity of ascertaining "net estate." *Phillips v. Phillips*, 34 N.C. App. 428, 238 S.E.2d 790 (1977).

§ 30-3. Effect of dissent.

Intestate Share Allocated so as to Cause Least Disruption of Decedent's Plan. — When a surviving spouse dissents from a will, the intestate share should be allocated so as to cause the least possible disruption of the decedent's plan for the distribution of his estate. In partitioning testatrix's property, her will should be given consideration, and insofar as possible

the beneficiaries of the will should receive the property testatrix intended for them to receive. *In re Estate of Etheridge*, 33 N.C. App. 585, 235 S.E.2d 924, cert. denied, 293 N.C. 253, 237 S.E.2d 535 (1977).

Stated in *Phillips v. Phillips*, 34 N.C. App. 428, 238 S.E.2d 790 (1977).

Chapter 31.**Wills.****ARTICLE 1.*****Execution of Will.*****§ 31-1. Who may make will.**

Editor's Note. —

For article, "The Contracts of Minors Viewed

from the Perspective of Fair Exchange," see 50

N.C.L. Rev. 517 (1972).

ARTICLE 2.***Revocation of Will.*****§ 31-5.3. Will not revoked by marriage; dissent from will made prior to marriage.**

Editor's Note. — For survey of 1973 case law on the revocation of wills by subsequent marriage, see 52 N.C.L. Rev. 949 (1974).

§ 31-5.8. Revival of revoked will.

Editor's Note. — For survey of 1973 case law on the revocation of wills by subsequent marriage, see 52 N.C.L. Rev. 949 (1974).

ARTICLE 6.***Caveat to Will.*****§ 31-32. When and by whom caveat filed.**

Applied in *In re Will of Joyner*, 35 N.C. App. 666, 242 S.E.2d 213 (1978).

ARTICLE 7.***Construction of Will.*****§ 31-42. Failure of devises and legacies by lapse or otherwise; renunciation.**

Editor's Note. —

For survey of 1976 case law on wills, trusts and estates, see 55 N.C.L. Rev. 1109 (1977).

Chapter 31A.
Acts Barring Property Rights.

ARTICLE 3.

Willful and Unlawful Killing of Decedent.

§ 31A-3. Definitions.

Editor's Note. — For note on the beneficiary's rights to the proceeds of an insurance policy when he takes the life of the insured, see 54 N.C.L. Rev. 1085 (1976).

§ 31A-11. Insurance benefits.

Editor's Note. — For note on the beneficiary's rights to the proceeds of an insurance policy when he takes the life of the insured, see 54 N.C.L. Rev. 1085 (1976).

ARTICLE 4.

General Provisions.

§ 31A-13. Record determining slayer admissible in evidence.

Editor's Note. — For note on the beneficiary's rights to the proceeds of an insurance policy when he takes the life of the insured, see 54 N.C.L. Rev. 1085 (1976).

§ 31A-15. Chapter to be broadly construed.

Editor's Note. — For note on the beneficiary's rights to the proceeds of an insurance policy when he takes the life of the insured, see 54 N.C.L. Rev. 1085 (1976).

Chapter 33.**Guardian and Ward.****Article 1.**

Sec.

Creation and Termination of Guardianship.

Sec.

- 33-1. Jurisdiction in clerk of superior court.
 33-6. Separate appointment for person and estate; yearly support specified; payments allowed in accounting.
 33-7. Proceedings on application for guardianship.

authorized to buy real estate foreclosed under mortgages executed to them.

- 33-27. Personal representative of guardian to pay over to clerk.

Article 6.**Public Guardians.**

- 33-47. When letters issue to public guardian.

Article 7.**Foreign Guardians.**

- 33-48. Right to removal of infant's or ward's personalty from State.
 33-49.1. Transfer of guardianship.

Article 8.**Estates without Guardian.**

- 33-54. When receiver to pay over estate.

Article 3.**Powers and Duties of Guardian.**

- 33-25. Guardians and other fiduciaries

ARTICLE 1.***Creation and Termination of Guardianship.***

§ 33-1. Jurisdiction in clerk of superior court. — The clerks of the superior court within their respective counties have full power, from time to time, to take cognizance of all matters concerning orphans and their estates and to appoint guardians in all cases of infants, incompetents or inebriates: Provided, that guardians shall be appointed by the clerks of the superior courts in the counties in which the infants, incompetents or inebriates reside, unless the guardians be the next of kin of such incompetents or a person designated by such next of kin in writing filed with the clerk, in which case, guardians may be appointed by the clerk of the superior court in any county in which is located a substantial part of the estates belonging to such incompetents, or unless an infant resides with an individual who is domiciled in the State of North Carolina and who is guardian of such infant's estate, in which case a guardian of the person of such infant may be appointed by the clerk of the superior court in the county in which the guardian of such infant's estate is domiciled. Provided, further, where any adult person is declared incompetent in connection with his commitment to a mental hospital or is found to be incompetent from want of understanding to manage his affairs by reason of physical and mental weakness on account of old age, disease, or other like infirmities, the clerk may appoint a trustee in lieu of a guardian for said persons. The trustee so appointed shall be subject to the laws now or which hereafter may be enacted for the control and handling of estates by guardians. (1762, c. 69, ss. 5, 7; R.C., c. 54, s. 2; 1868-9, c. 201, s. 4; Code, s. 1566; Rev., s. 1766; 1917, c. 41, s. 1; C.S., s. 2150; 1935, c. 467; 1945, c. 902; 1953, c. 615; 1959, c. 1028, s. 5; 1977, c. 725, s. 4.)

Editor's Note. —

The 1977 amendment, effective March 1, 1978, substituted "infants, incompetents or inebriates" for "infants, idiots, lunatics, inebriates, and inmates of the Caswell School" and "infants, incompetents, or inebriates" for "infants, idiots, lunatics, or inebriates" in the first sentence.

Session Laws 1977, c. 725, s. 8, provides in part that the act shall apply only to appointments

made on or after March 1, 1978.

Because of the postponed effective date of the 1977 amendment, this section as amended was not set out in the text in the 1977 Cumulative Supplement, but was carried in a note. The amended section is therefore set out in this 1978 Interim Supplement.

For comment analyzing North Carolina guardianship laws, see 54 N.C.L. Rev. 389 (1976).

§ 33-6. Separate appointment for person and estate; yearly support specified; payments allowed in accounting. — Instead of granting general guardianship to one person, the clerk of the superior court may commit the tuition and custody of the person to one and the charge of his estate to another, whenever at any time it appears most conducive to the proper care of the ward's estate, and to his suitable maintenance, nurture and education. In such cases the clerk must order what yearly sums of money or other provisions shall be allowed for the support and education of the orphan, or for the maintenance of the incompetent or inebriate, and must prescribe the time and manner of paying the same; but such allowance may, upon application and satisfactory proof made, be reduced or enlarged, or otherwise modified, as the ward's condition in life and the kind and value of his estate may require. All payments made by the guardian of the estate to the tutor of the person, according to any such order, shall be deemed just disbursements and be allowed in the settlement of his accounts; but for the payment thereof by the one and the receipt thereof by the other merely, no commissions shall be allowed to either, though commissions may be allowed to the tutor of the person on his disbursements only. (1840, c. 31; R.C., c. 54, s. 3; 1868-9, c. 201, ss. 6, 7; Code, ss. 1567, 1568, 1569; Rev., ss. 1767, 1768, 1769; C.S., s. 2155; 1977, c. 725, s. 4.)

Editor's Note. — The 1977 amendment, effective March 1, 1978, deleted "during minority, inebriety, idiocy or lunacy" following "at any time" in the first sentence, substituted "ward's" for "orphan's, inebriate's, idiot's, or lunatic's" in that sentence, and substituted "incompetent or inebriate" for "idiot, lunatic or inebriate" in the second sentence.

Session Laws 1977, c. 725, s. 8, provides in part

that the act shall apply only to appointments made on or after March 1, 1978.

Because of the postponed effective date of the 1977 amendment, this section as amended was not set out in the text in the 1977 Cumulative Supplement, but was carried in a note. The amended section is therefore set out in this 1978 Interim Supplement.

§ 33-7. Proceedings on application for guardianship. — On application to any clerk of the superior court for the custody and guardianship of any infant or incompetent, it is the duty of such clerk to inform himself of the circumstances of the case on the oath of the applicant, or of any other person, and if none of the relatives of the infant or incompetent are present at such application, the clerk must assign, or for any other good cause he may assign, a day for the hearing; and he shall thereupon direct notice thereof to be given to such of the relatives and to such other persons, if any, as he may deem it proper to notify. On the hearing he shall ascertain, on oath, the amount of the property, real and personal, of the infant or incompetent, and the value of the rents and profits of the real estate, and he may grant or refuse the application, or commit the guardianship to some other person, as he may think best for the interest of the infant or incompetent. (C.C.P., s. 474; Code, s. 1620; Rev., s. 1772; 1917, c. 41, s. 2; C.S., s. 2156; 1959, c. 1028, s. 5; 1977, c. 725, s. 4.)

Editor's Note. — The 1977 amendment, effective March 1, 1978, substituted "infant or incompetent" for "infant, idiot, inebriate, lunatic, or inmate of the Caswell School" throughout the section.

Session Laws 1977, c. 725, s. 8, provides in part that the act shall apply only to appointments

made on or after March 1, 1978.

Because of the postponed effective date of the 1977 amendment, this section as amended was not set out in the text in the 1977 Cumulative Supplement, but was carried in a note. The amended section is therefore set out in this 1978 Interim Supplement.

ARTICLE 2.

Guardian's Bond.

§ 33-12. Bond to be given before receiving property. — No guardian appointed for an infant or incompetent shall be permitted to receive property of the infant or incompetent until he shall have given sufficient security, approved by a judge, or the court, to account for and apply the same under the direction of the court; provided, however, that when a guardian is appointed for an infant or incompetent for the purpose of bringing an action on behalf of that infant or incompetent and when there are no other assets in the ward's estate or other assets belonging to the minor in the State of North Carolina, such guardian shall not be required to give sufficient security until such time as the property is turned over to such guardian, at which time the guardian shall give sufficient security approved by a judge or the court to account for and apply the same under the directions of the court. (C. C. P., s. 355; Code, s. 1573; Rev., s. 1777; C. S., s. 2161; 1967, c. 40, s. 1; 1977, c. 725, s. 4.)

Editor's Note. — The 1977 amendment, effective March 1, 1978, substituted "infant or incompetent" for "infant, idiot, lunatic, insane person or inebriate" in four places.

Session Laws 1977, c. 725, s. 8, provides in part that the act shall apply only to appointments made on or after March 1, 1978.

Because of the postponed effective date of the 1977 amendment, this section as amended was not set out in the text in the 1977 Cumulative Supplement, but was carried in a note. The amended section is therefore set out in this 1978 Interim Supplement.

§ 33-13. Terms and conditions of bond; increased on sale of realty. — Every guardian of the estate, before letters of appointment are issued to him, must give a bond payable to the State, with two or more sufficient sureties, to be acknowledged before and approved by the clerk of the superior court, and to be jointly and severally bound. Where such bond is executed by personal sureties the penalty in such bond must be double, at least, the value of all personal property and the rents and profits issuing from the real estate of the ward, which value is to be ascertained by the clerk of the superior court by the examination, on oath, of the applicant for guardianship, or any other person, but where such bond shall be executed by a duly authorized surety company, the penalty in such bond may be fixed at not less than one and one-fourth times the value of all personal property and the rents and profits issuing from the real estate of the ward: Provided, however, the clerk of the superior court may accept bond in estates, where the value of all personal property and rents and profits from real estate exceeds the sum of one hundred thousand dollars (\$100,000), in a sum equal to the value of all the personal property and rents and profits from real estate, plus ten percent (10%) of the value of all the personal property and rents and profits from real estate belonging to the estate. The bond must be conditioned that such guardian shall faithfully execute the trust reposed in him as such, and obey all lawful orders of the clerk or judge touching the guardianship of the estate committed to him. If, on application by the guardian, the court or judge shall decree a sale for any of the causes prescribed by law of the property of such infant or incompetent, before such sale to be confirmed, the guardian shall be required to file a bond as now required in double the

amount of the real property so sold, except where such bond is executed by a duly authorized surety company, in which case the penalty of said bond need not exceed one and one-fourth times the amount of said real property so sold. (1762, c. 69, s. 7; 1825, c. 1285, s. 2; 1833, c. 17; R. C., c. 54, s. 5; 1868-9, c. 201, s. 11; 1874-5, c. 214; Code, s. 1574; Rev., ss. 323, 1778; C. S., s. 2162; 1925, c. 131; 1935, c. 385; 1977, c. 725, s. 4.)

Editor's Note. — The 1977 amendment, effective March 1, 1978, substituted "infant or incompetent" for "infant, idiot, lunatic or insane person" in the last sentence.

Session Laws 1977, c. 725, s. 8, provides in part that the act shall apply only to appointments made on or after March 1, 1978.

Because of the postponed effective date of the 1977 amendment, this section as amended was not set out in the text in the 1977 Cumulative Supplement, but was carried in a note. The amended section is therefore set out in this 1978 Interim Supplement.

§ 33-15. Where several wards with estate in common, one bond sufficient.

— When the same person is appointed guardian to two or more minors or incompetents possessed of one estate in common, the clerk of the superior court may take one bond only in such case, upon which each of the minors or persons for whose benefit the bond is given, or their heirs or personal representatives, may have a separate action. (1822, c. 1161; R. C., c. 54, s. 8; 1868-9, c. 201, s. 13; Code, s. 1576; Rev., s. 1780; C. S., s. 2164; 1977, c. 725, s. 4.)

Editor's Note. — The 1977 amendment, effective March 1, 1978, substituted "minors or incompetents" for "minors, idiots, lunatics or insane persons."

Session Laws 1977, c. 725, s. 8, provides in part that the act shall apply only to appointments made on or after March 1, 1978.

Because of the postponed effective date of the 1977 amendment, this section as amended was not set out in the text in the 1977 Cumulative Supplement, but was carried in a note. The amended section is therefore set out in this 1978 Interim Supplement.

§ 33-18. Liability of clerk for taking insufficient bond. — If any clerk of the superior court shall commit the estate of an infant, incompetent or inebriate to the charge or guardianship of any person without taking good and sufficient security for the same as directed by law, such clerk shall be liable, on his official bond, at the suit of the party aggrieved, for all loss and damages sustained for want of security being taken; but if the sureties were good at the time of their being accepted, the clerk of the superior court shall not be liable. (1762, c. 69, ss. 5, 6; R. C., c. 54, s. 2; 1868-9, c. 201, s. 51; Code, s. 1614; Rev., s. 1784; C. S., s. 2167; 1977, c. 725, s. 4.)

Editor's Note. — The 1977 amendment, effective March 1, 1978, substituted "infant, incompetent or inebriate" for "infant, idiot, lunatic, insane person or inebriate."

Session Laws 1977, c. 725, s. 8, provides in part that the act shall apply only to appointments made on or after March 1, 1978.

Because of the postponed effective date of the 1977 amendment, this section as amended was not set out in the text in the 1977 Cumulative Supplement, but was carried in a note. The amended section is therefore set out in this 1978 Interim Supplement.

ARTICLE 3.

Powers and Duties of Guardian.

§ 33-20. Guardian to take charge of estate.

An action for divorce based upon one year's separation cannot be maintained by a general guardian on behalf of an incompetent. Freeman

v. Freeman, 34 N.C. App. 301, 237 S.E.2d 857 (1977).

Nowhere in this Chapter or Chapter 35

(Mentally ill persons and incompetents) is there express statutory authority for the general guardian of an incompetent to bring an action for divorce. *Freeman v. Freeman*, 34 N.C. App. 301, 237 S.E.2d 857 (1977).

An action for divorce based upon one year's separation is not a necessary action within this section. *Freeman v. Freeman*, 34 N.C. App. 301, 237 S.E.2d 857 (1977).

§ 33-25. Guardians and other fiduciaries authorized to buy real estate foreclosed under mortgages executed to them. — On application of the guardian or other fiduciary by petition, verified upon oath, to the superior court, showing that the purchase of real estate is necessary to avoid a loss to the said ward's estate by reason of the inadequacy of the amount bid at foreclosure sale under a mortgage or deed of trust securing the repayment of funds previously loaned the mortgagor by said guardian or other fiduciary, and that the interest of the ward would be materially promoted by said purchase, the proceeding shall be conducted as in other cases of special proceedings; and the truth of the matter alleged in the petition being ascertained by satisfactory proof, or by affidavit of three disinterested freeholders over 18 years of age who reside in the county in which said land lies, a decree may thereupon be made that said real estate be purchased by such person; but no purchase of real estate shall be made until approved by a judge of the superior court, nor shall the same be valid, nor any conveyance of the title made, unless confirmed and directed by a judge, and then only in compliance with the terms and conditions set out in said order and judgment. (1935, c. 156; 1971, c. 1231, s. 1; 1977, c. 725, s. 4.)

Editor's Note. — The 1977 amendment, effective March 1, 1978, deleted "of any idiot, inebriate, lunatic, non compos mentis or any person incompetent from want of understanding to manage his own affairs for any cause or reason, or any minor or infant, or any other person for whom such guardian or fiduciary has been appointed" following "guardian or other fiduciary" near the beginning of the section.

Session Laws 1977, c. 725, s. 8, provides in part that the act shall apply only to appointments made on or after March 1, 1978.

Because of the postponed effective date of the 1977 amendment, this section as amended was not set out in the text in the 1977 Cumulative Supplement, but was carried in a note. The amended section is therefore set out in this 1978 Interim Supplement.

§ 33-27. Personal representative of guardian to pay over to clerk. — In all cases where a guardian dies, it is competent for the executor or administrator of such deceased guardian, at any time after the grant of letters testamentary or of administration, to pay into the office of the clerk of the superior court of the county where such deceased guardian was appointed, any moneys belonging to the ward and any such payment shall have the effect to discharge the estate of said deceased guardian and his sureties upon his guardian bond to the extent of the amount so paid. (1881, c. 301, s. 2; Code, s. 1622; Rev., s. 1794; C. S., s. 2176; 1977, c. 725, s. 4.)

Editor's Note. — The 1977 amendment, effective March 1, 1977, deleted "of any minor child or of an idiot, lunatic, inebriate or insane person" following "where a guardian" near the beginning of the section and substituted "the ward" for "any such minor child, idiot, lunatic, insane person or inebriate" near the middle of the section.

Session Laws 1977, c. 725, s. 8, provides in part

that the act shall apply only to appointments made on or after March 1, 1978.

Because of the postponed effective date of the 1977 amendment, this section as amended was not set out in the text in the 1977 Cumulative Supplement, but was carried in a note. The amended section is therefore set out in this 1978 Interim Supplement.

ARTICLE 4.

*Sales of Ward's Estate.***§ 33-31. Special proceedings to sell; judge's approval required.****Proof Required. —**

The correct citation to the case under this catchline in the 1977 Supplement is: In re

Thomas, 290 N.C. 410, 226 S.E.2d 371 (1976). — Ed. note.

ARTICLE 6.

Public Guardians.

§ 33-47. When letters issue to public guardian. — The public guardian shall apply for and obtain letters of guardianship in the following cases:

- (1) When a period of six months has elapsed from the discovery of any property belonging to any minor, incompetent or inebriate, without guardian.
- (2) When any person entitled to letters of guardianship shall request in writing the clerk of the superior court to issue letters to the public guardian; but it is lawful and the duty of the clerk of the superior court to revoke said letters of guardianship at any time after issuing the same upon application in writing by any person entitled to qualify as guardian, setting forth a sufficient cause for such revocation. (1874-5, c. 221, ss. 6, 7; Code, s. 1561; Rev., s. 1760; C.S., s. 2194; 1977, c. 725, s. 4.)

Editor's Note. — The 1977 amendment, effective March 1, 1978, substituted "incompetent" for "idiot, lunatic, insane person" in subdivision (1).

Session Laws 1977, c. 725, s. 8, provides in part that the act shall apply only to appointments made on or after March 1, 1978.

Because of the postponed effective date of the 1977 amendment, this section as amended was not set out in the text in the 1977 Cumulative Supplement, but was carried in a note. The amended section is therefore set out in this 1978 Interim Supplement.

ARTICLE 7.

Foreign Guardians.

§ 33-48. Right to removal of infant's or ward's personalty from State. — Where any ward residing in another state or territory, or in the District of Columbia, or Canada, or other foreign country, is entitled to any personal estate in this State, or personal property substituted for realty by decree of court, or to any money arising from the sale of real estate whether the same be in the hands of any guardian residing in this State, or of any executor, administrator or other person holding for the ward or if the same (not being adversely held and claimed) be not in the lawful possession or control of any person, the guardian or trustee of the ward duly appointed at the place where such ward resides, or in the event no guardian or trustee has been appointed the court or officer of the court authorized by the laws of the state or territory or for the District of Columbia or Canada or other foreign country to receive moneys belonging to any ward when no guardian or trustee has been appointed for such person, may apply to have such estate removed to the residence of the ward by petition filed before the clerk of the superior court of the county in which the property or some portion thereof is situated which shall be proceeded with as in other cases of special proceedings. (1820, c. 1044; 1842, c. 38; R. C., c. 54, s. 29; 1868-9, c. 201, ss. 35, 38; 1874-5, c. 168; Code, ss. 1598, 1601; Rev., s. 1816; 1913, c. 86, s. 1; C. S., s. 2195; 1937, c. 307; 1963, c. 999, s. 1; 1977, c. 725, s. 4.)

Editor's Note. — The 1977 amendment, effective March 1, 1978, substituted "ward" for

"infant, ward, idiot, lunatic or insane person" near the beginning of the section and in three

places near the middle of the section, and substituted "ward" for "infants, idiots, lunatics or insane persons" near the middle of the section, and for "infant, idiot, lunatic or insane person" near the end of the section.

Session Laws 1977, c. 725, s. 8, provides in part that the act shall apply only to appointments

made on or after March 1, 1978.

Because of the postponed effective date of the 1977 amendment, this section as amended was not set out in the text in the 1977 Cumulative Supplement, but was carried in a note. The amended section is therefore set out in this 1978 Interim Supplement.

§ 33-49.1. Transfer of guardianship. — When any ward or cestui que trust, for whom a guardian or trustee has been appointed, lives in a county in this State other than the county in which letters were issued to such guardian or in which such trustee was appointed, the trustee or guardian may, by petition filed with the clerk of court of the county in which letters were issued or in which he was appointed, transfer the guardianship or trusteeship to the county of the residence of the ward or cestui que trust. Upon the removal of such guardianship or trusteeship, the clerk of the court of the county to which it is removed shall have the same powers and authority as he would have had if he had originally issued the letters of guardianship or appointed the trustee, and all reports and accounts required by law to be filed by the guardian or trustee shall be filed with the clerk of the court of the county to which such guardianship or trusteeship is removed. (1945, c. 194; 1961, c. 973; 1977, c. 725, s. 4.)

Editor's Note. — The 1977 amendment, effective March 1, 1978, deleted "mental defective, mentally disordered person" following "ward" in two places in the first sentence.

Session Laws 1977, c. 725, s. 8, provides in part that the act shall apply only to appointments

made on or after March 1, 1978.

Because of the postponed effective date of the 1977 amendment, this section as amended was not set out in the text in the 1977 Cumulative Supplement, but was carried in a note. The amended section is therefore set out in this 1978 Interim Supplement.

ARTICLE 8.

Estates without Guardian.

§ 33-54. When receiver to pay over estate. — When another guardian is appointed, he may apply by motion, on notice, to the judge of the superior court for an order upon the receiver to pay over all the money, estate and effects of the ward; and if no such guardian is appointed, then the infant, on coming of age, or in case of his death, his executor, administrator, or collector, and the heir or personal representative of the incompetent person, shall have the like remedy against the receiver. (1844, c. 41, s. 4; R. C., c. 54, s. 17; 1868-9, c. 201, s. 24; Code, s. 1587; Rev., s. 1814; C. S., s. 2201; 1977, c. 725, s. 4.)

Editor's Note. — The 1977 amendment, effective March 1, 1978, substituted "incompetent person" for "idiot, lunatic or insane person" near the end of the section.

Session Laws 1977, c. 725, s. 8, provides in part that the act shall apply only to appointments made on or after March 1, 1978.

Because of the postponed effective date of the 1977 amendment, this section as amended was not set out in the text in the 1977 Cumulative Supplement, but was carried in a note. The amended section is therefore set out in this 1978 Interim Supplement.

ARTICLE 12.

Gifts of Securities and Money to Minors.

§ 33-68. Definitions.

Editor's Note. —

For survey on 1972 case law on inheritance tax

and the Uniform Gifts to Minors Act, see 51
N.C.L. Rev. 1184 (1973).

§ 33-77. Short title.

Editor's Note. — For survey on 1972 case law
on inheritance tax and the Uniform Gifts to
Minors Act, see 51 N.C.L. Rev. 1184 (1973).

Chapter 35.**Persons with Mental Diseases and Incompetents.****Article 2.****Guardianship and Management of Estates of Incompetents.**

Sec.

35-2. Appointment of guardian.

35-2.1. Guardian appointed when issues answered by jury in any case.

35-3. Guardian appointed on certificate.

35-3.1. Ancillary guardian for insane or incompetent nonresident having real property in State.

35-6. Estates without guardian managed by clerk.

35-8. Renewal of obligations by guardians.

35-9. Guardian not liable.

Article 3.**Sales of Estates.**

35-10. Clerk may order sale, renting or mortgage.

Sec.

35-11. Purposes for which estate sold or mortgaged; parties; disposition of proceeds.

Article 5.**Surplus Income and Advancements.**

35-20. Advancement of surplus income to certain relatives.

35-21. Advancement to adult child or grandchild.

35-23. Distributees to be parties to proceeding for advancements.

35-24. Advancements to be equal; accounted for on death.

ARTICLE 1.**Definitions.****§ 35-1. Inebriates defined.**

Editor's Note. — For comment analyzing North Carolina guardianship laws, see 54 N.C.L. Rev. 389 (1976).

ARTICLE 2.***Guardianship and Management of Estates of Incompetents.***

§ 35-2. Appointment of guardian. — Any person, in behalf of one who is deemed an incompetent from want of understanding to manage his own affairs or inebriate by reason of the excessive use of intoxicating drinks, may file a petition before the clerk of the superior court of the county where such person resides, setting forth the facts, duly verified by the oath of the petitioner; whereupon such clerk shall issue an order, upon notice to the person, to the sheriff of the county, commanding him to summon a jury of 12 men to inquire into the state of such person. Upon the return of the sheriff summoning said jury, the clerk of the superior court shall swear and organize said jury and shall preside over said hearing, and the jury shall make return of their proceedings under their hand to the clerk, who shall file and record the same; and he shall proceed to appoint a guardian of any person so found to be inebriate or incompetent by inquisition of a jury, as in cases of orphans. The clerk shall appoint a guardian ad litem to represent the supposed inebriate or incompetent person.

Either the applicant or the ward may appeal from the finding of said jury to the next session of the superior court, when the matters at issue shall be regularly tried de novo before a jury, and pending such appeal, the clerk of the superior court shall not appoint a guardian for the said person, but the resident

judge of the district, or the judge presiding in the district, may in his discretion appoint a temporary receiver for the alleged incompetent pending the appeal. The trial of said appeal in the superior court shall have precedence over all other causes.

The jury shall make return of their proceedings under their hands to the clerk, who shall file and record the same; and he shall proceed to appoint a guardian of any person so found to be inebriate [or] incompetent by inquisition of a jury as in cases of orphans. If the person so adjudged incompetent shall be an inebriate within the definition of G.S. 35-1, the clerk shall proceed to commit said inebriate to the department for inebriates at the State Hospital at Raleigh for treatment and cure. He shall forward to the superintendent of said State Hospital a copy of the record required herein to be made, together with the commitment, and these shall constitute the authority to said superintendent to receive and care for such said inebriate. The expenses of the care and cure of said inebriate shall constitute a charge against the estate in the care of his guardian. If, however, such estate is not large enough to pay such expenses the same shall be a valid charge against the county from which said inebriate is sent. Provided, where the person is found to be incompetent from want of understanding to manage his affairs, by reason of physical and mental weakness on account of old age and/or disease and/or other like infirmities, the clerk may appoint a trustee instead of guardian for said person. The trustee or guardian appointed shall be vested with all the powers of a guardian administering an estate for any person and shall be subject to all the laws governing the administration of estates of minors and incompetents. The clerks of the superior courts who have heretofore appointed guardians for persons described in this proviso are hereby authorized and empowered to change said appointment from guardian to trustee. The sheriffs of the several counties to whom a process is directed under the provisions of this section shall serve the same without demanding their fees in advance. And the juries of the several counties upon whom a process is served under the provisions of this section shall serve and make their returns without demanding their fees in advance. (C. C. P., s. 473; Code, s. 1670; Rev., s. 1890; 1919, c. 54; C. S., s. 2285; 1921, c. 156, s. 1; 1929, c. 203, s. 1; 1933, c. 192; 1945, c. 952, s. 3; 1951, c. 777; 1971, c. 528, s. 31; 1977, c. 725, s. 5.)

Editor's Note. —

The 1977 amendment, effective March 1, 1978, in the first paragraph, substituted "an" for "a mental defective, inebriate, or mentally disordered, or" following "deemed," deleted "or other cause" following "use of intoxicating drinks," deleted "supposed mental defective, inebriate or mentally disordered" following "where such" and following "upon notice to the" and inserted "or inebriate" following "manage his own affairs," in the first sentence of the first paragraph. In the second sentence of the first paragraph the amendment deleted "a mental defective" following "found to be," "mentally disordered" following "inebriate," and "person" following "or incompetent." The amendment also added the third sentence of the first paragraph. In the first sentence of the second paragraph, the amendment substituted "ward"

for "supposed mental defective, inebriate, mentally disordered, or incompetent person" and deleted "supposed mental defective, inebriate, mentally disordered, or incompetent" following "guardian for the said." In the first sentence of the third paragraph, the amendment deleted "a mental defective" following "found to be," "mentally disordered" following "inebriate," and "person" following "incompetent."

Session Laws 1977, c. 725, s. 8, provides in part that the act shall apply only to appointments made on or after March 1, 1978.

Because of the postponed effective date of the 1977 amendment, this section as amended was not set out in the text in the 1977 Cumulative Supplement, but was carried in a note. The amended section is therefore set out in this 1978 Interim Supplement.

§ 35-2.1. Guardian appointed when issues answered by jury in any case.
— When a jury in the trial of any civil or criminal case shall find, in answer to appropriate issues, that a person is without sufficient mental capacity to conduct

business, it shall have the same effect as an adjudication before the clerk of the superior court and the clerk may forthwith appoint a guardian or trustee for the person so adjudged incompetent. (1945, c. 96; 1977, c. 725, s. 5.)

Editor's Note. — The 1977 amendment, effective March 1, 1978, deleted "insane or" preceding "without sufficient mental capacity" and preceding "incompetent."

Session Laws 1977, c. 725, s. 8, provides in part that the act shall apply only to appointments made on or after March 1, 1978.

Because of the postponed effective date of the 1977 amendment, this section as amended was not set out in the text in the 1977 Cumulative Supplement, but was carried in a note. The amended section is therefore set out in this 1978 Interim Supplement.

§ 35-3. Guardian appointed on certificate. — If any person is confined in any State, territorial or governmental hospital for the mentally ill in this State or in any other state or territory, or in the District of Columbia, or in any hospital licensed and supervised by the State of North Carolina, the certificate of the superintendent of such hospital declaring such person to be mentally ill, which certificate shall be sworn to and subscribed before the clerk of the superior court or any notary public, or the clerk of any court of record in the county, in which such hospital is situated and certified under the seal of court, shall be sufficient evidence to authorize the clerk to appoint a guardian for such person. Further, the clerks of the different counties of this State are also authorized to appoint guardians for any person entitled to the benefits of the War Risk Insurance Act, as amended, and the World War Veterans' Act of 1924, as amended, where it shall appear from the certificate of the Regional Medical Officer of the United States Veterans' Bureau of North Carolina that such veteran of the World War has been declared by the United States Government as incompetent to receive the funds to be paid to him under said acts of Congress, and such certificate shall be all the proof required as to the incapacity of said veteran to receive such funds and as to the necessity of a guardian. Guardians for such veterans shall be subject to the same provisions of law as guardians of inebriates and incompetent persons in this State.

Any guardian or trustee appointed prior to April 3, 1939, under the provisions of this section or certificate issued by the superintendent of any hospital licensed and supervised by the State of North Carolina, and any and all proceedings based thereon are hereby validated. (1860-1, c. 22; Code, s. 1673; Rev., ss. 1891, 4609; 1907, c. 232; C. S., s. 2286; 1927, c. 160, s. 1; 1939, c. 330; 1953, c. 675, s. 31; 1959, c. 1001; 1963, c. 1184, s. 37; 1977, c. 725, s. 5.)

Editor's Note. —

The 1977 amendment, effective March 1, 1978, in the first paragraph, substituted "hospital for the mentally ill" for "asylum or hospital for the insane" and "mentally ill" for "of insane mind and memory or mentally retarded" in the first sentence, deleted "or State training school" following "in this State," "or training school" following "such hospital" in two places, and "idiot, lunatic or insane" following "guardian for such" in the first sentence, and deleted "idiots" following "as guardians of" and

"lunatics" following "inebriates" near the end of the third sentence.

Session Laws 1977, c. 725, s. 8, provides in part that the act shall apply only to appointments made on or after March 1, 1978.

Because of the postponed effective date of the 1977 amendment, this section as amended was not set out in the text in the 1977 Cumulative Supplement, but was carried in a note. The amended section is therefore set out in this 1978 Interim Supplement.

§ 35-3.1. Ancillary guardian for incompetent nonresident having real property in State. — Whenever it shall appear by petition, application, and due proof to the satisfaction of any clerk of the superior court of North Carolina that:

- (1) There is real property situate in the county of said clerk in which a

- nonresident of the State of North Carolina has an interest or estate;
- (2) That said nonresident is incompetent and that a guardian has been appointed and is still serving for him or her in the state of his or her residence; and
- (3) That such incompetent nonresident has no guardian in the State of North Carolina;

Such clerk of the superior court before whom such petition, application and satisfactory proof is made shall thereupon be fully authorized and empowered to appoint in his county an ancillary guardian, which guardian shall have all the powers, duties and responsibilities with respect to the estate of said incompetent, in the State of North Carolina as guardians otherwise appointed now have; and such ancillary guardian shall annually make an accounting to the court in this State and remit to the guardian in the state of the ward's residence any net rents of said real estate, or any proceeds of sale, to the guardian of the state of residence of said incompetent.

A transcript of the record of any court of record appointing a guardian of a nonresident in the state of his residence shall be conclusive proof of the fact of incompetency and of the appointment of such guardian of the residence of the incompetent. Provided, that such transcript shall show that such guardianship is still in effect in the state of the ward's residence, and that the incompetency of the ward still exists.

Upon the appointment of an ancillary guardian in this State under this Article, the clerk of the superior court shall forthwith notify the clerk of the superior court of the county of the ward's residence, and shall also notify the guardian in the state of the ward's residence. (1949, c. 986; 1977, c. 725, s. 5.)

Editor's Note. —

The 1977 amendment, effective March 1, 1978, deleted "insane or" preceding "incompetent" in subdivision (2), deleted "or insane" following "incompetent" in subdivision (3), deleted "insane person, or" preceding "incompetent" in two places in the second paragraph and in the first sentence of the third paragraph, and deleted "or insanity" following "incompetency" in the first sentence of the third paragraph.

Session Laws 1977, c. 725, s. 8, provides in part that the act shall apply only to appointments made on or after March 1, 1978.

Because of the postponed effective date of the 1977 amendment, this section as amended was not set out in the text in the 1977 Cumulative Supplement, but was carried in a note. The amended section is therefore set out in this 1978 Interim Supplement.

§ 35-6. Estates without guardian managed by clerk. — When any person is declared to be incompetent or inebriate and no suitable person will act as his guardian, the clerk shall secure the estate of such person according to the law relating to orphans whose guardians have been removed. (1846, c. 43, s. 1; R. C., c. 57, s. 6; Code, s. 1676; Rev., s. 1894; C. S., s. 2289; 1977, c. 725, s. 5.)

Editor's Note. — The 1977 amendment, effective March 1, 1978, substituted "incompetent" for "of nonsane mind."

Session Laws 1977, c. 725, s. 8, provides in part that the act shall apply only to appointments made on or after March 1, 1978.

Because of the postponed effective date of the 1977 amendment, this section as amended was not set out in the text in the 1977 Cumulative Supplement, but was carried in a note. The amended section is therefore set out in this 1978 Interim Supplement.

§ 35-8. Renewal of obligations by guardians. — In all cases where a guardian has been appointed for a person and said person is the maker or one of the makers, a surety or one of the sureties, an indorser or one of the indorsers of any note, bond, or other obligation for the payment of money, which is due or past due at the time of the appointment of the guardian, or shall thereafter become due prior to the settlement of the estate of said ward, the guardian of said ward's estate is hereby authorized and empowered to execute, as such

guardian, a new note, bond, or other obligation for the payment of money, in the same capacity as the ward was obligated, for the same amount or less, but not greater than the sum due on the original obligation. Such new note shall be in lieu of the original obligation of the ward, whether made payable to the original holder or to another. Such guardian is authorized and empowered to renew said note, bond, or other obligation for the payment of money from time to time; and said note, bond, or other obligation so executed by such guardian shall be binding upon the estate of said ward to the same extent and in the same manner and with the same effect that the original bond, note, or other obligation executed by the ward was binding upon his estate: Provided, the time for final payment of the note, bond, or other obligation for the payment of money, or any renewal thereof by said guardian shall not extend beyond a period of two years from the qualification of the original guardian as such upon the estate of said ward. (1927, c. 45, s. 1; 1977, c. 725, s. 5.)

Editor's Note. — The 1977 amendment, effective March 1, 1978, deleted "who has been judicially declared to be an inebriate, lunatic, or incompetent from want of understanding to manage his or her own affairs by reason of the excessive use of intoxicating drink or other causes" following "appointed for a person" near the beginning of the section.

Session Laws 1977, c. 725, s. 8, provides in part

that the act shall apply only to appointments made on or after March 1, 1978.

Because of the postponed effective date of the 1977 amendment, this section as amended was not set out in the text in the 1977 Cumulative Supplement, but was carried in a note. The amended section is therefore set out in this 1978 Interim Supplement.

§ 35-9. Guardian not liable. — The execution of any note, bond or other obligation for the payment of money mentioned in G.S. 35-8 by the guardian, shall not be held or construed to be binding upon the said guardian personally. (1927, c. 45, s. 2; 1977, c. 725, s. 5.)

Editor's Note. — The 1977 amendment, effective March 1, 1978, deleted "of the inebriate, lunatic, or incompetent" following "by the guardian."

Session Laws 1977, c. 725, s. 8, provides in part that the act shall apply only to appointments made on or after March 1, 1978.

Because of the postponed effective date of the 1977 amendment, this section as amended was not set out in the text in the 1977 Cumulative Supplement, but was carried in a note. The amended section is therefore set out in this 1978 Interim Supplement.

ARTICLE 3.

Sales of Estates.

§ 35-10. Clerk may order sale, renting or mortgage. — When it appears to any clerk of the superior court by report of the guardian of any inebriate or person found incompetent that his personal estate has been exhausted, or is insufficient for his support, and that he is likely to become chargeable on the county, the clerk may make an order for the sale, mortgage or renting of his personal or real estate, or any part thereof, in such manner and upon such terms as he may deem advisable. The procedure for any sale made pursuant to this section shall be as provided by Article 29A of Chapter 1 of the General Statutes. Any order made under the authority of this section for the sale, mortgage or renting of real estate, or both real and personal property, shall be made by and all proceedings shall be had before the clerk of the superior court of the county in which all or any part of the real estate is situated; if the order applied for is for the sale, mortgage or renting of personal property, then said order may be made and the proceedings may be had before the clerk of the superior court of the county in which all or any part of the personal property is situated; such

order shall specify particularly the property thus to be disposed of, with the terms of renting or sale or mortgage, and shall be entered at length on the records of the court and all sales and rentings and conveyances by mortgages or deeds in trust made under this section shall be valid to convey the interest and estate directed to be sold or conveyed by mortgage or deed in trust, and the title thereof shall be conveyed by a commissioner to be appointed by the clerk; or the clerk may direct the guardian to file his petition for such purpose. Nothing herein contained shall be construed to divest the court of the power to order private sales as heretofore ordered in proper cases. (1801, c. 589; R. C., c. 57, s. 4; Code, s. 1674; Rev., s. 1896; C. S., s. 2291; 1931, c. 184, s. 1; 1945, c. 426, s. 3; c. 952, s. 4; c. 1084, s. 3; 1949, c. 719, s. 2; 1977, c. 725, s. 5.)

Editor's Note. —

The 1977 amendment, effective March 1, 1978, in the first sentence, deleted "mental defective" following "guardian of any" and substituted "person found incompetent" for "mentally disordered person."

Session Laws 1977, c. 725, s. 8, provides in part that the act shall apply only to appointments

made on or after March 1, 1978.

Because of the postponed effective date of the 1977 amendment, this section as amended was not set out in the text in the 1977 Cumulative Supplement, but was carried in a note. The amended section is therefore set out in this 1978 Interim Supplement.

§ 35-11. Purposes for which estate sold or mortgaged; parties; disposition of proceeds. — When it appears to the clerk, upon the petition of the guardian of any inebriate or person found incompetent, that a sale or mortgage of any part of his real or personal estate is necessary for his maintenance, or for the discharge of debts unavoidably incurred for his maintenance, or when the clerk is satisfied that the interest of the inebriate or person found incompetent would be materially and essentially promoted by the sale or mortgage of any part of such estate; or when any part of his real estate is required for public purposes, the clerk may order a sale thereof to be made by such person, in such way and on such terms as he shall adjudge. The clerk, if it be deemed proper, may direct to be made parties to such petition the next of kin or presumptive heirs of such person with mental disorder or inebriate. And if on the hearing the clerk orders such sale or mortgage, the same shall be made and the proceeds applied and secured, and shall descend and be distributed in like manner as is provided for the sale of infants' estates decreed in like cases to be sold on application of their guardians, as directed in the Chapter entitled Guardian and Ward. The word "mortgage" whenever used herein shall be construed to include deeds in trust. All petitions filed under the authority of this section wherein an order is sought for the sale or mortgage of real estate, both real and personal property, shall be filed in the office of the clerk of the superior court of the county in which all or any part of the real estate is situated; if the order of sale sought in the petition is for the sale or mortgage of personal property, the petition shall be filed in the office of the clerk of the superior court of the county in which any or all of such personal property is situated. The procedure for any sale made pursuant to this section shall be provided by Article 29A of Chapter 1 of the General Statutes. (R. C., c. 57, s. 5; Code, s. 1675; Rev., s. 1897; C. S., s. 2292; 1931, c. 184, s. 2; 1945, c. 426, s. 4; c. 952, s. 5; c. 1084, s. 4; 1949, c. 719, s. 2; 1977, c. 725, s. 5.)

Editor's Note. — The 1977 amendment, effective March 1, 1978, substituted "inebriate or person found incompetent" for "mental defective, inebriate or mentally disordered person" in two places in the first sentence.

Session Laws 1977, c. 725, s. 8, provides in part that the act shall apply only to appointments

made on or after March 1, 1978.

Because of the postponed effective date of the 1977 amendment, this section as amended was not set out in the text in the 1977 Cumulative Supplement, but was carried in a note. The amended section is therefore set out in this 1978 Interim Supplement.

ARTICLE 5.

Surplus Income and Advancements.

§ 35-20. **Advancement of surplus income to certain relatives.** — When any incompetent person, of full age, and not having made a valid will, has children or grandchildren (such grandchildren being the issue of a deceased child), and is possessed of an estate, real or personal, whose annual income is more than sufficient abundantly and amply to support himself, and to support, maintain and educate the members of his family, with all the necessities and suitable comforts of life, it is lawful for the clerk of the superior court for the county in which such person has his residence to order from time to time, and so often as may be judged expedient, that fit and proper advancements be made, out of the surplus of such income, to any such child, or grandchild, not being a member of his family and entitled to be supported, educated and maintained out of the estate of such person. Whenever any incompetent person of full age, not being married and not having issue, be possessed, or his guardian be possessed for him, of any estate, real or personal, or of an income which is more than sufficient amply to provide for such person, it shall be lawful for the clerk of the superior court for the county in which such person resided prior to incompetency to order from time to time, and so often as he may deem expedient, that fit and proper advancements be made, out of the surplus of such estate or income, to his or her parents, brothers and sisters, or grandparents to whose support, prior to his incompetency, he contributed in whole or in part. (R. C., c. 57, s. 9; Code, s. 1677; Rev., s. 1900; C. S., s. 2296; Ex. Sess. 1924, c. 93; 1971, c. 528, s. 32; 1977, c. 725, s. 5.)

Editor's Note. — The 1977 amendment, effective March 1, 1978, substituted "incompetent" for "nonsane" near the beginning of the first and second sentences and substituted "incompetency" for "insanity" in two places in the second sentence.

Session Laws 1977, c. 725, s. 8, provides in part that the act shall apply only to appointments

made on or after March 1, 1978.

Because of the postponed effective date of the 1977 amendment, this section as amended was not set out in the text in the 1977 Cumulative Supplement, but was carried in a note. The amended section is therefore set out in this 1978 Interim Supplement.

§ 35-21. **Advancement to adult child or grandchild.** — When such incompetent person is possessed of a real or personal estate in excess of an amount more than sufficient to abundantly and amply support himself with all the necessities and suitable comforts of life and has no minor children nor immediate family dependent upon him for support, education or maintenance, such advancements may be made out of such excess of the principal of his estate to such child or grandchild of age for the better promotion or advancement in life or in business of such child or grandchild: Provided, that the order for such advancement shall be approved by the resident or presiding judge of the district who shall find the facts in said order of approval. (1925, c. 136, s. 1; 1977, c. 725, s. 5.)

Editor's Note. — The 1977 amendment substituted "incompetent" for "nonsane" near the beginning of the section.

Session Laws 1977, c. 725, s. 8, provides in part that the act shall apply only to appointments made on or after March 1, 1978.

Because of the postponed effective date of the 1977 amendment, this section as amended was not set out in the text in the 1977 Cumulative Supplement, but was carried in a note. The amended section is therefore set out in this 1978 Interim Supplement.

§ 35-23. **Distributees to be parties to proceeding for advancements.** — In every application for such advancements, the guardian of the incompetent

person and all such other persons shall be parties as would at that time be entitled to a distributive share of his estate if he were then dead. (R. C., c. 57, s. 11; Code, s. 1679; Rev., s. 1902; C. S., s. 2298; 1977, c. 725, s. 5.)

Editor's Note. — The 1977 amendment, effective March 1, 1978, substituted "incompetent" for "nonsane."
Session Laws 1977, c. 725, s. 8, provides in part that the act shall apply only to appointments made on or after March 1, 1978.

Because of the postponed effective date of the 1977 amendment, this section as amended was not set out in the text in the 1977 Cumulative Supplement, but was carried in a note. The amended section is therefore set out in this 1978 Interim Supplement.

§ 35-24. Advancements to be equal; accounted for on death. — The clerk, in ordering such advancements, shall, as far as practicable, so order the same as that, on the death of the incompetent person, his estate shall be distributed among his distributees in the same equal manner as if the advancements had been made by the person himself; and on his death every sum advanced to a child or grandchild shall be an advancement, and shall bear interest from the time it may be received. (R. C., c. 57, s. 12; Code, s. 1680; Rev., s. 1903; C. S., s. 2299; 1977, c. 725, s. 5.)

Editor's Note. — The 1977 amendment, effective March 1, 1978, substituted "incompetent" for "nonsane."
Session Laws 1977, c. 725, s. 8, provides in part that the act shall apply only to appointments made on or after March 1, 1978.

Because of the postponed effective date of the 1977 amendment, this section as amended was not set out in the text in the 1977 Cumulative Supplement, but was carried in a note. The amended section is therefore set out in this 1978 Interim Supplement.

ARTICLE 7.

*Sterilization of Persons Mentally Ill
and Mentally Retarded.*

§ 35-36. Sterilization of mental defectives in State institutions.

Editor's Note. —
For survey of 1976 case law on constitutional law, see 55 N.C.L. Rev. 965 (1977).
For comment on In re Sterilization of Moore,

289 N.C. 95, 221 S.E.2d 307 (1976), upholding the constitutionality of this article, see 8 N.C. Central L.J. 307 (1977).

Chapter 39. Conveyances.

ARTICLE 1.

Construction and Sufficiency.

§ 39-1. Fee presumed, though word "heirs" omitted.

Editor's Note. —

For article, "The Rule In Wild's Case in North Carolina," see 55 N.C.L. Rev. 751 (1977).

For a note on the continued use of the Artis-Oxendine rule in the construction of deeds, see 13 Wake Forest L. Rev. 478 (1977).

§ 39-1.1. In construing conveyances court shall give effect to intent of the parties.

Editor's Note. —

For a note on the continued use of the

Artis-Oxendine rule in the construction of deeds, see 13 Wake Forest L. Rev. 478 (1977).

ARTICLE 2.

Conveyances by Husband and Wife.

§ 39-7.1. Certain instruments affecting married woman's title not executed by husband validated.

Quoted in *Faucette v. Griffin*, 35 N.C. App. 7, 239 S.E.2d 712 (1978).

§ 39-13.1. Validation of certain deeds, etc., executed by married women without private examination.

Stated in *Faucette v. Griffin*, 35 N.C. App. 7, 239 S.E.2d 712 (1978).

§ 39-13.2. Married persons under 18 made competent as to certain transactions; certain transactions validated.

Editor's Note. —

For article, "The Contracts of Minors Viewed

from the Perspective of Fair Exchange," see 50 N.C.L. Rev. 517 (1972).

§ 39-13.5. Creation of tenancy by entirety in partition of real property.

Stated in *Miller v. Miller*, 34 N.C. App. 209, 237 S.E.2d 552 (1977).

ARTICLE 3.

Fraudulent Conveyances.

§ 39-15. Conveyance with intent to defraud creditors void.

I. GENERAL CONSIDERATION.

Editor's Note. —

For an analysis and comparison of the law of

fraudulent conveyances in North Carolina with the Uniform Fraudulent Conveyances Act, see 50 N.C.L. Rev. 873 (1972).

II. WHAT CONVEYANCES FRAUDULENT.**A. In General.****Rule Stated. —**

In accord with original. See North Carolina

Nat'l Bank v. Evans, 35 N.C. App. 322, 241 S.E.2d 379 (1978).

§ 39-16. Conveyance with intent to defraud purchasers void.**Editor's Note. —**

For an analysis and comparison of the law of fraudulent conveyances in North Carolina with

the Uniform Fraudulent Conveyances Act, see 50 N.C.L. Rev. 873 (1972).

§ 39-17. Voluntary conveyance evidence of fraud as to existing creditors.

Editor's Note. — For an analysis and comparison of the law of fraudulent conveyances in North Carolina with the Uniform Fraudulent Conveyances Act, see 50 N.C.L. Rev. 873 (1972).

Sufficiency of Property Retained. —

Creditor's motion for summary judgment was properly granted where the record showed that the creditor met his burden of proof by uncontroverted evidence that immediately after the conveyances in question, defendant owed plaintiff \$56,000, and that she had property

worth only \$300.00. North Carolina Nat'l Bank v. Johnson Furn. Co., 34 N.C. App. 134, 237 S.E.2d 313 (1977).

Presumptions and Burden of Proof. —

The ultimate burden of proof rests upon the plaintiff to show either actual intent by the defendant grantors to defraud their creditors or failure by them to retain property sufficient to pay the then existing debts. North Carolina Nat'l Bank v. Johnson Furn. Co., 34 N.C. App. 134, 237 S.E.2d 313 (1977).

§ 39-19. Purchasers for value and without notice protected.

Editor's Note. — For an analysis and comparison of the law of fraudulent conveyances in North Carolina with the Uniform

Fraudulent Conveyances Act, see 50 N.C.L. Rev. 873 (1972).

Chapter 40.

Eminent Domain.

ARTICLE 1.

Right of Eminent Domain.

§ 40-3. Right to enter on and purchase lands.

Stated in Orange Water & Sewer Auth. v.
Estate of Armstrong, 34 N.C. App. 162, 237
S.E.2d 486 (1977).

Chapter 41.

Estates.

§ 41-1. Fee tail converted into fee simple.

I. GENERAL CONSIDERATION.

Editor's Note. — For article, "The Rule In Wild's Case in North Carolina," see 55 N.C.L. Rev. 751 (1977).

§ 41-2.1. Right of survivorship in bank deposits created by written agreement.

Applied in Sutton v. Sutton, 35 N.C. App. 670,
242 S.E.2d 644 (1978).

Cited in Moore v. Galloway, 35 N.C. App. 394,
241 S.E.2d 386 (1978).

§ 41-5. Unborn infant may take by deed or writing.

Editor's Note. — For article, "The Rule In Wild's Case in North Carolina," see 55 N.C.L. Rev. 751 (1977).

§ 41-6. "Heirs" construed to be "children" in certain limitations.

Editor's Note. — For article, "The Rule In Wild's Case in North Carolina," see 55 N.C.L. Rev. 751 (1977).

Constitutionally. — Since there are no pay-
table in neighborhood corner, the three-month
and section (b) of this section may be
pay table and place an unconstitutionally
three-monthly burden upon less-than-affluent
residents in summary judgment cases.
in violation of the Equal Protection Clause of the
United States Constitution. *United States v. Waters*, 418
F. Supp. 1212 (W.D.N.C. 1977).
Section 41-52, under as it allows additional
damages of double rent and subsection (b) of
this section under as it requires an underwriter
in an amount not less than three months' rent,
and § 41-1, Rule (2)(a) under as it excepts

Chapter 42.

Landlord and Tenant.

ARTICLE 3.

Summary Ejectment.

§ 42-32. Damages assessed to trial.

Constitutionality. — Since there are no jury trials in magistrates' courts, the three-month rent bond of § 42-34(b), the double rent penalty of the present section and the entitlement of the landlord to immediate execution on a judgment of summary ejectment under § 1A-1, Rule 62(a), are obstacles to effective appeal to the district court which effectively deprive the indigent tenant of access to jury trial without justification or rationale adequate to survive a constitutional test. *Usher v. Waters Ins. & Realty Co.*, 438 F. Supp. 1215 (W.D.N.C. 1977).

Taken together, §§ 1A-1, Rule 62(a), 42-34(b), and this section deny access to jury trial and place an unconstitutionally discriminatory burden upon less-than-affluent tenant-appellants in summary ejectment cases, in violation of the equal protection clause of the United States Constitution. *Usher v. Waters Ins. & Realty Co.*, 438 F. Supp. 1215 (W.D.N.C. 1977).

This section, insofar as it allows additional damages of double rent, and § 42-34(b) insofar as it requires an undertaking in an amount not less than three months' rent, and § 1A-1, Rule 62(a) insofar as it excepts summary ejectment cases from an automatic ten-day stay of execution of judgment, are unconstitutional and unenforceable. *Usher v. Waters Ins. & Realty Co.*, 438 F. Supp. 1215 (W.D.N.C. 1977).

This section and §§ 42-34(b) and 1A-1, Rule 62(a) are unconstitutional in that they (a) arbitrarily, irrationally and unequally burden and foreclose the right of tenants in summary ejectment to trial by jury and to a meaningful

appeal and preclude such tenants from fairly pursuing their constitutional rights in the state courts, and (b) violate the Equal Protection Clause of the Fourteenth Amendment because of the discrimination they create between tenant-appellants on the one hand and civil appellants generally on the other hand. *Usher v. Waters Ins. & Realty Co.*, 438 F. Supp. 1215 (W.D.N.C. 1977).

Double Rent Penalty Has Effect of Blocking Appeals by Poor Tenants. — Historically the double rent penalty and the other sanctions of the North Carolina statutes and rules relating to summary ejectment have the effect of blocking almost all appeals, meritorious and otherwise, by poor tenants while not deterring frivolous appeals by those who can afford the cost. Screening frivolous appeals is not a purpose reasonably related to the double rent penalty. *Usher v. Waters Ins. & Realty Co.*, 438 F. Supp. 1215 (W.D.N.C. 1977).

The combined effect of the three-month rent bond of § 42-34(b), the double rent penalty of this section and the entitlement of the landlord to immediate execution on a judgment of summary ejectment under § 1A-1, Rule 62(a) is to make appeals difficult for all tenants and impossible for indigent tenants and to deprive indigent tenants of the right of trial by jury. These statutes and Rule 62(a) in effect extinguish the rights of indigent tenants to any meaningful appeal. *Usher v. Waters Ins. & Realty Co.*, 438 F. Supp. 1215 (W.D.N.C. 1977).

§ 42-34. Undertaking on appeal; when to be increased.

Constitutionality. — Since there are no jury trials in magistrates' courts, the three-month rent bond of subsection (b) of this section, the double rent penalty of § 42-32, and the entitlement of the landlord to immediate execution on a judgment of summary ejectment under § 1A-1, Rule 62(a), are obstacles to effective appeal to the district court which effectively deprive the indigent tenant of access to jury trial without justification or rationale adequate to survive a constitutional test. *Usher v. Waters Ins. & Realty Co.*, 438 F. Supp. 1215 (W.D.N.C. 1977).

Taken together, §§ 1A-1, Rule 62(a) and 42-32 and subsection (b) of this section deny access to jury trial and place an unconstitutionally discriminatory burden upon less-than-affluent tenant-appellants in summary ejectment cases, in violation of the Equal Protection Clause of the United States Constitution. *Usher v. Waters Ins. & Realty Co.*, 438 F. Supp. 1215 (W.D.N.C. 1977).

Section 42-32, insofar as it allows additional damages of double rent, and subsection (b) of this section insofar as it requires an undertaking in an amount not less than three months' rent, and § 1A-1, Rule 62(a) insofar as it excepts

summary ejectment cases from an automatic ten-day stay of execution of judgment, are unconstitutional and unenforceable. *Usher v. Waters Ins. & Realty Co.*, 438 F. Supp. 1215 (W.D.N.C. 1977).

Sections 42-32 and 1A-1, Rule 62(a) and subsection (b) of this section are unconstitutional in that they (a) arbitrarily, irrationally and unequally burden and foreclose the right of tenants in summary ejectment to trial by jury and to a meaningful appeal and preclude such tenants from fairly pursuing their constitutional rights in the state courts, and (b) violate the Equal Protection Clause of the Fourteenth Amendment because of the discrimination they create between tenant-appellants on the one hand and civil appellants generally on the other hand. *Usher v. Waters Ins. & Realty Co.*, 438 F. Supp. 1215 (W.D.N.C. 1977).

The bond requirement of subsection (b) is discriminatory; such a bond is not required of appellants in any other case. *Usher v. Waters Ins. & Realty Co.*, 438 F. Supp. 1215 (W.D.N.C. 1977).

Requirement of Three Months' Rent

Irrational and Unnecessary. — To require three months' rent to stay execution in advance of an appeal which might last an indefinite time is irrational and is unnecessary to accomplish any reasonable state purpose. *Usher v. Waters Ins. & Realty Co.*, 438 F. Supp. 1215 (W.D.N.C. 1977).

Bond requirement of subsection (b) does not serve any legitimate state interest. *Usher v. Waters Ins. & Realty Co.*, 438 F. Supp. 1215 (W.D.N.C. 1977).

Three-Month Rent Bond Has Effect of Blocking Appeals by Poor Tenants. — The combined effect of the three-month rent bond of subsection (b) of this section, the double rent penalty of § 42-32 and the entitlement of the landlord to immediate execution on a judgment of summary ejectment under § 1A-1, Rule 62(a) is to make appeals difficult for all tenants and impossible for indigent tenants and to deprive indigent tenants of the right of trial by jury. These statutes and Rule 62(a) in effect extinguish the rights of indigent tenants to any meaningful appeal. *Usher v. Waters Ins. & Realty Co.*, 438 F. Supp. 1215 (W.D.N.C. 1977).

§ 44-12. Filing claim of lien.

Quoted in *Water Community Investors, Inc. v. Berry*, 233 N.C. 235, 237, 34 S.E.2d 694 (1977).

§ 44-13. Action to enforce lien.

Better Practice to File Where Claim of Lien is Filed. — It is the better practice in the law to enforce a lien in the county in which the claim of lien is filed. *Water Community Investors, Inc. v. Berry*, 233 N.C. 235, 237, 34 S.E.2d 694 (1977).

Though Language is Ambiguous as to the Jurisdictional Requirement. — The language contained in subsection (b) of this section that the action to enforce a lien "may be brought in the county in which the claim of lien is filed" is ambiguous and requires a declaratory judgment. *Water Community Investors, Inc. v. Berry*, 233 N.C. 235, 237, 34 S.E.2d 694 (1977).

The 1977 amendment adding subsection (b) is among indications that it was the intent of the legislature to enact a jurisdictional statute when it used language in subsection (a) as the

which was the intent of the legislature to enact a jurisdictional statute when it used language in subsection (a) as the

Chapter 44.**Liens.****Article 9B.****Attachment or Garnishment and Lien
for Ambulance Service in
Certain Counties.**

Sec.

44-51.8. Counties to which Article applies.

ARTICLE 9B.***Attachment or Garnishment and Lien for Ambulance
Service in Certain Counties.***

§ 44-51.8. Counties to which Article applies. — The provisions of this Article shall apply only to Alamance, Alleghany, Anson, Ashe, Beaufort, Bladen Brunswick, Buncombe, Burke, Cabarrus, Caldwell, Caswell, Catawba Cherokee, Cleveland, Columbus, Cumberland, Davidson, Edgecombe, Forsyth Franklin, Gaston, Granville, Greene, Guilford, Halifax, Harnett, Haywood Henderson, Hertford, Hoke, Hyde, Johnston, Jones, Lee, Lenoir, Lincoln McDowell, Madison, Mecklenburg, Mitchell, Montgomery, Moore, Nash Onslow, Pasquotank, Person, Pitt, Polk, Randolph, Richmond, Robeson Rockingham, Rutherford, Sampson, Scotland, Stanly, Stokes, Surry Transylvania, Tyrrell, Union, Vance, Wake, Warren, Washington, Watauga Wilkes, Wilson, Yadkin and Yancey Counties. (1969, c. 708, s. 5; c. 1197; 1971, c. 132; 1973, c. 880, s. 1; cc. 887, 894, 907, 1182; 1975, c. 595, s. 1; 1977, cc. 64, 138, 357; 1977, 2nd Sess., cc. 1144, 1157.)

Editor's Note. —

The first 1977, 2nd Sess., amendment made this section applicable to Harnett County.

The second 1977, 2nd Sess., amendment made this section applicable to Polk County.

Chapter 44A.

Statutory Liens and Charges.

ARTICLE 1.

Possessory Liens on Personal Property.

§ 44A-2. Persons entitled to lien on personal property.

Editor's Note. —

For note on garagemen's liens and duress of goods, see 54 N.C.L. Rev. 1106 (1976).

§ 44A-3. When lien arises and terminates.

Editor's Note. — For note on garagemen's liens and duress of goods, see 54 N.C.L. Rev. 1106 (1976).

§ 44A-4. Enforcement of lien.

Editor's Note. —

For note on garagemen's liens and duress of goods, see 54 N.C.L. Rev. 1106 (1976).

ARTICLE 2.

Statutory Liens on Real Property.

Part 1. Liens of Mechanics, Laborers and Materialmen Dealing with Owner.

§ 44A-12. Filing claim of lien.

Quoted in *Ridge Community Investors, Inc. v. Berry*, 293 N.C. 688, 239 S.E.2d 566 (1977).

§ 44A-13. Action to enforce lien.

Better Practice to File Where Claim of Lien Is Filed. — It is the better practice to file the action to enforce a lien in the county in which the claim of lien is filed. *Ridge Community Investors, Inc. v. Berry*, 293 N.C. 688, 239 S.E.2d 566 (1977).

Though Language in Subsection (a) Is Not Jurisdictional Requirement. — The language contained in subsection (a) stating that the action to enforce a lien "may be instituted in any county in which the lien is filed" is not a jurisdictional requirement. *Ridge Community Investors, Inc. v. Berry*, 293 N.C. 688, 239 S.E.2d 566 (1977).

The 1977 amendment adding subsection (c) is a strong indication that it was not the intent of the legislature to enact a jurisdictional requisite when it used language in subsection (a) to the

effect that such action "may be instituted in any county in which the lien is filed." *Ridge Community Investors, Inc. v. Berry*, 293 N.C. 688, 239 S.E.2d 566 (1977).

The effect of subsection (c) is to give protection to purchasers and examiners of titles no matter where the action to enforce the lien is instituted. *Ridge Community Investors, Inc. v. Berry*, 293 N.C. 688, 239 S.E.2d 566 (1977).

Liens established pursuant to this Chapter are not "contractual security" within the meaning of Rule 55(b)(1) of the Rules of Civil Procedure and a clerk or assistant clerk of court is without jurisdiction to make orders consummating foreclosure of liens established pursuant to Chapter 44A of the General Statutes. *Ridge Community Investors, Inc. v. Berry*, 293 N.C. 688, 239 S.E.2d 566 (1977).

§ 44A-16. Discharge of record lien.

Subdivision (6) is more for the benefit of the landowner than the lien-creditor. Gelder & Assocs. v. St. Paul Fire & Marine Ins. Co., 34 N.C. App. 731, 239 S.E.2d 604 (1977).

The lien-creditor has no choice under subdivision (6) as to whether the lien will be cancelled. Gelder & Assocs. v. St. Paul Fire & Marine Ins. Co., 34 N.C. App. 731, 239 S.E.2d 604 (1977).

Landowner Free to Sell, Mortgage, etc., Land after Action under Subdivision (5) or (6).

— Under subdivision (6) the landowner can post a bond and free his land from the weight of the lien while the parties litigate over the amount, if any, that may finally be determined to be due. He can accomplish the same result by depositing cash with the clerk under subdivision (5). He is then free to sell, mortgage or otherwise encumber the land free of the lien. Gelder & Assocs. v. St. Paul Fire & Marine Ins. Co., 34 N.C. App. 731, 239 S.E.2d 604 (1977).

Chapter 45.

Mortgages and Deeds of Trust.

ARTICLE 2A.

Sales under Power of Sale.

Part 1. General Provisions.

§ 45-21.9. Amount to be sold when property sold in parts; sale of remainder if necessary.**Editor's Note. —**

For comment discussing changes in North

Carolina's foreclosure law, see 54 N.C.L. Rev. 903 (1976).

§ 45-21.10. Requirement of cash deposit at sale.

Trustee's Discretion as to Whether Cash Deposit Required. — A trustee's advertisement for a foreclosure sale which states that the "highest bidder will be required to make a cash deposit" does not eliminate the trustee's

exercise of discretion as to whether he will require the cash deposit when the terms of the deed of trust do not require a cash deposit. *White v. Lemon Tree Inn*, 35 N.C. App. 117, 239 S.E.2d 878 (1978).

Part 2. Procedure for Sale.

§ 45-21.16. Notice and hearing.**Editor's Note. —**

For comment discussing changes in North

Carolina's foreclosure law, see 54 N.C.L. Rev. 903 (1976).

§ 45-21.16A. Contents of notice of sale.**Editor's Note. —**

For comment discussing changes in North

Carolina's foreclosure law, see 54 N.C.L. Rev. 903 (1976).

§ 45-21.17. Posting and publishing notice of sale of real property.**Editor's Note. —**

For survey of 1972 case law on notice requirements of the nonjudicial foreclosure sale, see 51 N.C.L. Rev. 1110 (1973).

For comment discussing changes in North Carolina's foreclosure law, see 54 N.C.L. Rev. 903 (1976).

Due Process Satisfied. —

The legislature intended to meet the requirements of due process by demanding both posting and publication under this section. *Albemarle Realty & Mtg. Co. v. Peoples Bank*, 34 N.C. App. 481, 238 S.E.2d 622 (1977).

Both Posting and Publication Required. — This section, read as a whole, requires both

publishing and posting for full notice. When a deed of trust or other instrument omits provisions for either posting or publication, subsection (b) is triggered requiring both forms of notice. *Albemarle Realty & Mtg. Co. v. Peoples Bank*, 34 N.C. App. 481, 238 S.E.2d 622 (1977).

Where Date on Notice Is Not Date of Posting. — As long as minimum due process is met, there is no reason to preclude proof that the date on the face of the notice was not the actual date of posting. *Albemarle Realty & Mtg. Co. v. Peoples Bank*, 34 N.C. App. 481, 238 S.E.2d 622 (1977).

§ 45-21.21. Postponement of sale.**Editor's Note. —**

For comment discussing changes in North

Carolina's foreclosure law, see 54 N.C.L. Rev. 903 (1976).

§ 45-21.29. Resale of real property; jurisdiction; procedure; orders for possession.

Editor's Note. —

For survey of 1972 case law on notice requirements of the nonjudicial foreclosure sale, see 51 N.C.L. Rev. 1110 (1973).

For comment discussing changes in North Carolina's foreclosure law, see 54 N.C.L. Rev. 903 (1976).

Both Posting and Publication Required. —

The legislature intended to meet the requirements of due process by demanding both posting and publication under this section. *Albemarle Realty & Mtg. Co. v. Peoples Bank*, 34 N.C. App. 481, 238 S.E.2d 622 (1977).

§ 45-21.30. Failure of bidder to make cash deposit or to comply with bid; resale.

Editor's Note. —

For comment discussing changes in North

Carolina's foreclosure law, see 54 N.C.L. Rev. 903 (1976).

§ 45-21.33. Final report of sale of real property.

Editor's Note. —

For comment discussing changes in North

Carolina's foreclosure law, see 54 N.C.L. Rev. 903 (1976).

ARTICLE 2B.

Injunctions; Deficiency Judgments.

§ 45-21.38. Deficiency judgments abolished where mortgage represents part of purchase price.

Applied in *Armelt Mgt. Corp. v. Stanhagen*, 35 N.C. App. 571, 241 S.E.2d 713 (1978).

§ 45-21.45. Validation of foreclosure sales where notice and hearing not provided.

Editor's Note. —

For comment discussing changes in North

Carolina's foreclosure law, see 54 N.C.L. Rev. 903 (1976).

ARTICLE 7.

Instruments to Secure Future Advances and Future Obligations.

§ 45-67. Definition.

Editor's Note. — For article, "Future Advances Lending in North Carolina," see 13 Wake Forest L. Rev. 297 (1977).

§ 45-68. Requirements.

Editor's Note. — For article, "Future Advances Lending in North Carolina," see 13 Wake Forest L. Rev. 297 (1977).

§ 45-69. Fluctuation of obligations within maximum amount.

Editor's Note. — For article, "Future Advances Lending in North Carolina," see 13 Wake Forest L. Rev. 297 (1977).

§ 45-70. Priority of security instrument.

Editor's Note. — For article, "Future Advances Lending in North Carolina," see 13 Wake Forest L. Rev. 297 (1977).

§ 45-71. Satisfaction of the security instrument.

Editor's Note. — For article, "Future Advances Lending in North Carolina," see 13 Wake Forest L. Rev. 297 (1977).

§ 45-72. Termination of future optional advances.

Editor's Note. — For article, "Future Advances Lending in North Carolina," see 13 Wake Forest L. Rev. 297 (1977).

§ 45-73. Cancellation of record; presentation of notes described in security instrument sufficient.

Editor's Note. — For article, "Future Advances Lending in North Carolina," see 13 Wake Forest L. Rev. 297 (1977).

§ 45-74. Article not exclusive.

Editor's Note. — For article, "Future Advances Lending in North Carolina," see 13 Wake Forest L. Rev. 297 (1977).

Chapter 46.**Partition.****ARTICLE 2.***Partition Sales of Real Property.***§ 46-22. Sale in lieu of partition.**

Applied in Meachem v. Boyce, 35 N.C. App. 506, 241 S.E.2d 880 (1978).

Chapter 47.**Probate and Registration.****ARTICLE 1.***Probate.***§ 47-18. Conveyances, contracts to convey, options and leases of land.****I. IN GENERAL.****Editor's Note. —**

For survey of 1976 case law on commercial law, see 55 N.C.L. Rev. 943 (1977).

ARTICLE 4.*Curative Statutes; Acknowledgments; Probates; Registration.***§ 47-71.1. Corporate seal omitted prior to January, 1973.**

Cited in *Philbin Invs., Inc. v. Orb Enterprises, Ltd.*, 35 N.C. App. 622, 242 S.E.2d 176 (1978).

Chapter 47A.**Unit Ownership Act.****§ 47A-19. Bylaws; contents.**

Editor's Note. — For article discussing the incidents in the common areas of the problem of potentially unlimited liability of a condominium, see 50 N.C.L. Rev. 1 (1971).
condominium owner for damages resulting from

§ 47A-26. Actions as to common interests; service of process on designated agent; exhaustion of remedies against association.

Editor's Note. — For article discussing the incidents in the common areas of the problem of potentially unlimited liability of a condominium, see 50 N.C.L. Rev. 1 (1971).
condominium owner for damages resulting from

Chapter 47B.**Real Property Marketable Title Act.****§ 47B-1. Declaration of policy and statement of purpose.**

Editor's Note. — For survey of 1976 case law on property, see 55 N.C.L. Rev. 1069 (1977).

§ 47B-3. Exceptions.

Editor's Note. — For note discussing effect of exceptions to the thirty-year limitation, see 52 N.C.L. Rev. 211 (1973).

For survey of 1976 case law on property, see 55 N.C.L. Rev. 1069 (1977).

Chapter 48.**Adoptions.****§ 48-5. When parent is not necessary party to adoption proceedings.**

The putative father of a child born out of wedlock is entitled to notice prior to a judicial determination as to whether his written consent to the adoption of the child is required. Opinion

of Attorney General to Mr. Robert H. Ward, Director, N.C. Division of Social Services, 47 N.C.A.G. 132 (1977).

§ 48-23. Legal effect of final order.

And Becomes a Stranger to the Bloodline, etc.—

By adoption, the adopted child becomes legally the child of the adoptive parents and becomes legally a stranger to the bloodline of his natural parents. *Acker v. Barnes*, 33 N.C. App. 750, 236 S.E.2d 715, cert. denied, 293 N.C. 360, 238 S.E.2d 149 (1977).

Prerogative to Determine with Whom Children Associate. — Dismissal for failure to

state a claim upon which relief could be granted was proper where the paternal grandmother and natural aunt of children legally adopted by the present husband of the natural mother sought visitation rights, since parents with lawful custody of minor children retain the prerogative to determine with whom their children shall associate. *Acker v. Barnes*, 33 N.C. App. 750, 236 S.E.2d 715, cert. denied, 293 N.C. 360, 238 S.E.2d 149 (1977).

Chapter 48A.

Minors.

§ 48A-1. Common-law definition of “minor” abrogated.

Editor's Note. — For article, "The Contracts of Minors Viewed from the Perspective of Fair Exchange," see 50 N.C.L. Rev. 517 (1972).

For survey of 1972 case law on child support and pre-Chapter 48A consent judgments, see 51 N.C.L. Rev. 1091 (1973).

§ 48A-2. Age of minors.

Editor's Note. — For article, "The Contracts of Minors Viewed from the Perspective of Fair Exchange," see 50 N.C.L. Rev. 517 (1972).

§ 48A-3. Statute of limitations: applicability.

Editor's Note. — For article, "The Contracts of Minors Viewed from the Perspective of Fair Exchange," see 50 N.C.L. Rev. 517 (1972).

Chapter 49.

Bastardy.

ARTICLE 1.

Support of Illegitimate Children.

§ 49-2. Nonsupport of illegitimate child by parents made misdemeanor.

Violation of Statute Is Continuing Offense. —

In accord with 2nd paragraph in original. See State v. Garner, 34 N.C. App. 498, 238 S.E.2d 653 (1977).

But Paternity Need Not Be Relitigated, etc. —

In accord with 1st paragraph in original. See State v. Garner, 34 N.C. App. 498, 238 S.E.2d 653 (1977).

§ 49-7. Issues and orders.

Cited in State v. Garner, 34 N.C. App. 498, 238 S.E.2d 653 (1977).

Chapter 50.

Divorce and Alimony.

Sec.	Sec.
50-3. Venue; removal of action.	50-13.4. Action for support of minor child.
50-6. Divorce after separation of one year on application of either party.	50-16.7. How alimony and alimony pendente lite paid; enforcement of decree.
50-13.3. Enforcement of order for custody.	

§ 50-3. Venue; removal of action. — In all proceedings for divorce, the summons shall be returnable to the court of the county in which either the plaintiff or defendant resides.

[In] any action brought under Chapter 50 for alimony or divorce filed in a county where the plaintiff resides but the defendant does not reside, where both parties are residents of the State of North Carolina, and where the plaintiff removes from the State and ceases to be a resident, the action may be removed upon motion of the defendant, for trial or for any motion in the cause, either before or after judgment, to the county in which the defendant resides. The judge, upon such motion, shall order the removal of the action, and the procedures of G.S. 1-87 shall be followed. (1871-2, c. 193, s. 40; Code, s. 1289; Rev., s. 1559; 1915, c. 229, s. 1; C. S., s. 1657; 1977, 2nd Sess., c. 1223.)

Editor's Note. — The 1977, 2nd Sess., amendment added the second paragraph.

§ 50-6. Divorce after separation of one year on application of either party. — Marriages may be dissolved and the parties thereto divorced from the bonds of matrimony on the application of either party, if and when the husband and wife have lived separate and apart for one year, and the plaintiff or defendant in the suit for divorce has resided in the State for a period of six months. This section shall be in addition to other acts and not construed as repealing other laws on the subject of divorce. A plea of res judicata or of recrimination, with respect to any provision of G.S. 50-5 or of 50-7, shall not be a bar to either party's obtaining a divorce under this section. Notwithstanding the provisions of G.S. 50-11, or of the common law, a divorce under this section obtained by a supporting spouse shall not affect the rights of a dependent spouse with respect to alimony which have been asserted in the action or any other pending action. (1931, c. 72; 1933, c. 163; 1937, c. 100, ss. 1, 2; 1943, c. 448, s. 3; 1949, c. 264, s. 3; 1965, c. 636, s. 2; 1977, c. 817, s. 1; 1977, 2nd Sess., c. 1190, s. 1.)

Editor's Note. — The 1977, 2nd Sess., amendment, rewrote the former third sentence as the present third and fourth sentences.

Session Laws 1977, 2nd Sess., c. 1190, s. 2, provides: "In an action initiated after August 1, 1977, a judgment of divorce under G.S. 50-6, entered before the effective date of this act

[June 11, 1978] and when there was no pending action for support or alimony, shall be valid even though the court did not make a determination that there was no such pending action or a determination that all claims for support or alimony had been fully and finally adjudicated."

§ 50-8. Contents of complaint; verification; venue and service in action by nonresident; certain divorces validated.

No Conflict with Rule 13(a). — There is no conflict between the statutes dealing with procedure in divorce actions and § 1A-1, Rule 13(a). Rather, Rule 13(a) superimposes an additional characteristic on certain kinds of

counterclaims. *Gardner v. Gardner*, 294 N.C. 172, 240 S.E.2d 399 (1978).

The statutes dealing specifically with divorce actions do not prescribe a procedure for counterclaims different from that prescribed in

§ 1A-1, Rule 13(a). *Gardner v. Gardner*, 294 N.C. 172, 240 S.E.2d 399 (1978).

§ 50-11. Effects of absolute divorce.

Editor's Note. —

For survey of 1976 case law on domestic relations, see 55 N.C.L. Rev. 1018 (1977).

§ 50-13.1. Action or proceeding for custody of minor child.

Cited in *Acker v. Barnes*, 33 N.C. App. 750, 236 S.E.2d 715 (1977).

§ 50-13.3. Enforcement of order for custody. — (a) An order providing for the custody of a minor child is enforceable by proceedings for civil contempt and its disobedience may be punished by proceedings for criminal contempt, as provided in Chapter 5A, Contempt, of the General Statutes.
(1977, c. 711, s. 26.)

Editor's Note. —

The 1977 amendment, effective July 1, 1978, rewrote subsection (a).

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons

sentenced before July 1, 1978.

Session Laws 1977, c. 711, s. 36, contains a severability clause.

Because of the postponed effective date of the 1977 amendment, subsection (a) as amended was not set out in the text in the 1977 Cumulative Supplement, but was carried in a note. The amended subsection is therefore set out in this 1978 Interim Supplement.

As the rest of the section was not changed by the amendment, only subsection (a) is set out.

§ 50-13.4. Action for support of minor child.

(f) Remedies for enforcement of support of minor children shall be available as herein provided.

- (1) The court may require the person ordered to make payments for the support of a minor child to secure the same by means of a bond, mortgage or deed of trust, or any other means ordinarily used to secure an obligation to pay money or transfer property, or by requiring the execution of an assignment of wages, salary or other income due or to become due.
- (2) If the court requires the transfer of real or personal property or an interest therein as provided in subsection (e) as a part of an order for payment of support for a minor child, or for the securing thereof, the court may also enter an order which shall transfer title as provided in G.S. 1A-1, Rule 70 and G.S. 1-228.
- (3) The remedy of arrest and bail, as provided in Article 34 of Chapter 1 of the General Statutes, shall be available in actions for child-support payments as in other cases.
- (4) The remedies of attachment and garnishment, as provided in Article 35 of Chapter 1 of the General Statutes, shall be available in an action for child-support payments as in other cases, and for such purposes the child or person bringing an action for child support shall be deemed a creditor of the defendant. In addition, an independent garnishment

proceeding, as provided in G.S. 110-136, shall be available for enforcement of child-support obligations.

- (5) The remedy of injunction, as provided in Article 37 of Chapter 1 of the General Statutes and G.S. 1A-1, Rule 65, shall be available in actions for child support as in other cases.
- (6) Receivers, as provided in Article 38 of Chapter 1 of the General Statutes, may be appointed in actions for child support as in other cases.
- (7) A minor child or other person for whose benefit an order for the payment of child support has been entered shall be a creditor within the meaning of Article 3 of Chapter 39 of the General Statutes pertaining to fraudulent conveyances.
- (8) A judgment for child support shall not be a lien against real property unless the judgment expressly so provides, sets out the amount of the lien in a sum certain, and adequately describes the real property affected; but past due periodic payments may by motion in the cause or by a separate action be reduced to judgment which shall be a lien as other judgments.
- (9) An order for the payment of child support is enforceable by proceedings for civil contempt and its disobedience may be punished by proceedings for criminal contempt, as provided in Chapter 5A, Contempt, of the General Statutes.
- (10) The remedies provided by Chapter 1 of the General Statutes, Article 28, Execution; Article 29B, Execution Sales; and Article 31, Supplemental Proceedings, shall be available for the enforcement of judgments for child support as in other cases, but amounts so payable shall not constitute a debt as to which property is exempt from execution as provided in Article 32 of Chapter 1 of the General Statutes.
- (11) The specific enumeration of remedies in this section shall not constitute a bar to remedies otherwise available. (1967, c. 1153, s. 2; 1969, c. 895, s. 17; 1975, c. 814; 1977, c. 711, s. 26.)

Editor's Note. —

The 1977 amendment, effective July 1, 1978, rewrote subdivision (f)(9).

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

Session Laws 1977, c. 711, s. 36, contains a severability clause.

Because of the postponed effective date of the 1977 amendment, subsection (f) as amended was not set out in the text in the 1977 Cumulative Supplement, but was carried in a note. The amended subsection is therefore set out in this 1978 Interim Supplement.

As the rest of the section was not changed by the amendment, only subsection (f) is set out.

For survey of 1972 case law on child support and pre-Chapter 48A consent judgments, see 51 N.C.L. Rev. 1091 (1973).

For survey of 1976 case law on domestic relations, see 55 N.C.L. Rev. 1018 (1977).

For note on the remedy of garnishment in child support, see 56 N.C.L. Rev. 169 (1978).

Father Primarily Liable, etc. — In accord with 1977 Cum. Supp. See Hicks v. Hicks, 34 N.C. App. 128, 237 S.E.2d 307 (1977).

Ability to Pay Considered. —

In determining the amount of support the court must take into consideration the needs of the children and the ability of the defendant to pay during the time for which reimbursement is sought. Hicks v. Hicks, 34 N.C. App. 128, 237 S.E.2d 307 (1977).

And Failure to Identify Purposes, etc. —

In accord with original. See Martin v. Martin, 35 N.C. App. 610, 242 S.E.2d 393 (1978).

Court Has Broad Discretion under Subsection (e). — The court is not limited to ordering one method of payment to the exclusion of the others provided in subsection (e). The legislature's use of the disjunctive and the phrase "as the court may order" shows that the court is to have broad discretion in providing for payment of child support orders. Moore v. Moore, 35 N.C. App. 748, 242 S.E.2d 642 (1978).

Award of Homeplace. —

The General Assembly has made statutory provisions in subsection (f)(2) for awarding possession of a home as a part of child support.

This is true without regard to whether the parties are divorced. To the extent the General Assembly's will, as expressed in this section, conflicts with the common-law principle that the husband is entitled to exclusive possession of entirety property, the common law has been abrogated and supplanted. *Martin v. Martin*, 35 N.C. App. 610, 242 S.E.2d 393 (1978).

Measure of Liability for Reimbursement of Support Funds Expended. — Where there is no evidence or finding as to the actual amount expended by plaintiff for the support of the children for which she is entitled to reimbursement from defendant, what the defendant "should have paid" is not the measure of his liability to plaintiff. The measure of defendant's liability to plaintiff is the amount actually expended by plaintiff which represents

the defendant's share of support. *Hicks v. Hicks*, 34 N.C. App. 128, 237 S.E.2d 307 (1977).

No Reimbursement for Share of Support Determined by Court. — In an action by a mother for child support, she is not entitled to be reimbursed for sums expended by her for the support of the children which represent her share of support as determined by the trial judge, considering the relative ability of the parties to provide support. *Hicks v. Hicks*, 34 N.C. App. 128, 237 S.E.2d 307 (1977).

Mother not Entitled to Compensation for Support by Others. — In an action by a mother for child support, she is not entitled to be compensated for support for the children provided by others. *Hicks v. Hicks*, 34 N.C. App. 128, 237 S.E.2d 307 (1977).

§ 50-13.5. Procedure in actions for custody or support of minor children.

Editor's Note. —

For survey of 1972 case law on child support and pre-Chapter 48A consent judgments, see 51 N.C.L. Rev. 1091 (1973).

For survey of 1976 case law on domestic relations, see 55 N.C.L. Rev. 1018 (1977).

No Conflict with Rule 13(a). — There is no conflict between the statutes dealing with procedure in divorce actions and § 1A-1, Rule 13(a). Rather Rule 13(a) superimposes an additional characteristic on certain kinds of counterclaims. *Gardner v. Gardner*, 294 N.C. 172, 240 S.E.2d 399 (1978).

The statutes dealing specifically with divorce actions do not prescribe a procedure for counterclaims different from that prescribed in

§ 1A-1, Rule 13(a). *Gardner v. Gardner*, 294 N.C. 172, 240 S.E.2d 399 (1978).

When Subdivision (c)(5) Is Satisfied. —

Subdivision (c)(5) of this section should be read to apply only when a custody proceeding is pending in another state. Section 50-13.7(b) applies when a custody order has been entered in another state. *Searl v. Searl*, 34 N.C. App. 583, 239 S.E.2d 305 (1977).

State Court May Yield, etc. —

A trial court, proceeding under subdivision (c)(5) either in exercising or refusing to exercise jurisdiction, must make findings of fact regarding the best interests of the child. *Searl v. Searl*, 34 N.C. App. 583, 239 S.E.2d 305 (1977).

§ 50-13.6. Counsel fees in actions for custody and support of minor children.

Editor's Note. — For survey of 1976 case law on domestic relations, see 55 N.C.L. Rev. 1018 (1977).

Applied in *Lindsey v. Lindsey*, 34 N.C. App. 201, 237 S.E.2d 561 (1977).

§ 50-13.7. Modification of order for child support or custody.

Editor's Note. —

For survey of 1972 case law on child support and pre-Chapter 48A consent judgments, see 51 N.C.L. Rev. 1091 (1973).

And Change Must Be Substantial. —

In accord with 1st paragraph in original. See *Searl v. Searl*, 34 N.C. App. 583, 239 S.E.2d 305 (1977).

Burden of Showing Changed Circumstances. —

The party moving for modification assumes the burden of proving a substantial change of

circumstances affecting the welfare of the child. *Searl v. Searl*, 34 N.C. App. 583, 239 S.E.2d 305 (1977).

Court's Findings of Fact Are Conclusive. — A finding by the district court that there has been no sufficient change of circumstances to justify modification of a custody order is conclusive and binding on the court of appeals if supported by competent evidence. *Searl v. Searl*, 34 N.C. App. 583, 239 S.E.2d 305 (1977).

Applicability of Subsection (b) Contrasted with that of § 50-13.5(c)(5). — Section

50-13.5(c)(5) should be read to apply only when a custody proceeding is pending in another state. Subsection (b) of the present section applies

when a custody order has been entered in another state. *Searl v. Searl*, 34 N.C. App. 583, 239 S.E.2d 305 (1977).

§ 50-13.8. Custody and support of persons incapable of self-support upon reaching majority.

Editor's Note. —

For survey of 1972 case law on child support

and pre-Chapter 48A consent judgments, see 51 N.C.L. Rev. 1091 (1973).

§ 50-16.1. Definitions.

Applied in *Ross v. Ross*, 33 N.C. App. 447, 235 S.E.2d 405 (1977).

Cited in *Davis v. Davis*, 35 N.C. App. 111, 240 S.E.2d 488 (1978).

§ 50-16.3. Grounds for alimony pendente lite.

Prerequisites for Obtaining Alimony Pendente Lite. — In order to obtain alimony pendente lite, the applicant must be (1) a dependent spouse, (2) entitled to the relief demanded in the action, and (3) without sufficient means whereon to subsist during the prosecution or defense of the suit and to defray the necessary expenses thereof. *Ross v. Ross*, 33 N.C. App. 447, 235 S.E.2d 405 (1977).

Findings of Fact Necessary for Award of Attorney Fees. — In order to award attorney fees in alimony cases the trial court must make findings of fact showing that fees are allowable and that the amount awarded is reasonable. *Upchurch v. Upchurch*, 34 N.C. App. 658, 239 S.E.2d 701 (1977).

Counsel fees are not allowable in all alimony cases, only those that come within the ambit of this section and § 50-16.4. *Upchurch*

v. Upchurch, 34 N.C. App. 658, 239 S.E.2d 701 (1977).

The facts required by the statutes must be, etc. —

The facts required by this section must be alleged and proved before the order of alimony pendente lite is properly entered. *Ross v. Ross*, 33 N.C. App. 447, 235 S.E.2d 405 (1977).

When Award Based on Capacity to Earn. —

An award of alimony pendente lite may not be based on the earning capacity of the supporting spouse in the absence of a finding that the defendant is failing to exercise his capacity to earn because of a disregard of his marital obligation to provide reasonable support. *Gobble v. Gobble*, 35 N.C. App. 765, 242 S.E.2d 516 (1978).

Applied in *Davis v. Davis*, 35 N.C. App. 111, 240 S.E.2d 488 (1978).

§ 50-16.4. Counsel fees in actions for alimony.

Elements to Be Considered. —

At any time a dependent spouse can show that she has the grounds for alimony pendente lite — (1) that she is entitled to the relief demanded in her action or cross-action for divorce from bed and board or alimony without divorce, and (2) that she does not have sufficient means whereon to subsist during the prosecution or defense of the suit and to defray the necessary expenses thereof — the court is authorized to award fees to her counsel. *Upchurch v. Upchurch*, 34 N.C. App. 658, 239 S.E.2d 701 (1977).

"At any time" includes times subsequent to determination of the issues in favor of the dependent spouse at the trial of her cause on its merits. *Upchurch v. Upchurch*, 34 N.C. App. 658, 239 S.E.2d 701 (1977).

Counsel fees are not allowable in all

alimony cases, only those that come within the ambit of this section and § 50-16.3. *Upchurch v. Upchurch*, 34 N.C. App. 658, 239 S.E.2d 701 (1977).

Findings of Fact Must Support Award. —

In order to award attorney fees in alimony cases the trial court must make findings of fact showing that fees are allowable and that the amount awarded is reasonable. *Upchurch v. Upchurch*, 34 N.C. App. 658, 239 S.E.2d 701 (1977).

Section Not Restricted to Alimony Pendente Lite Proceedings. — While the language of this section could be improved upon, its effect is not to restrict the award of counsel fees to alimony pendente lite proceedings and actions of the court pursuant thereto. *Upchurch v. Upchurch*, 34 N.C. App. 658, 239 S.E.2d 701 (1977).

§ 50-16.5. Determination of amount of alimony.

Discretion of Judge. —

The amount of alimony allowed is a matter within the discretion of the trial judge and his decision will not be disturbed absent a showing of abuse of discretion. *Upchurch v. Upchurch*, 34 N.C. App. 658, 239 S.E.2d 701 (1977).

Finding on Dependent Spouse's Earning Capacity Not Always Required. — This section

specifies the earning capacity of the parties as one of the factors the court should consider in determining the amount of alimony, but the court is not required in all cases to make findings of fact on the question of the dependent spouse's earning capacity. *Upchurch v. Upchurch*, 34 N.C. App. 658, 239 S.E.2d 701 (1977).

§ 50-16.6. When alimony not payable.

Applied in *Levitch v. Levitch*, 294 N.C. 437, 241 S.E.2d 506 (1978).

§ 50-16.7. How alimony and alimony pendente lite paid; enforcement of decree.

(j) An order for the payment of alimony or alimony pendente lite is enforceable by proceedings for civil contempt and its disobedience may be punished by proceedings for criminal contempt, as provided in Chapter 5A, Contempt, of the General Statutes.

(1977, c. 711, s. 26.)

Editor's Note. —

The 1977 amendment, effective July 1, 1978, rewrote subsection (j).

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

Session Laws 1977, c. 711, s. 36, contains a severability clause.

Because of the postponed effective date of the 1977 amendment, subsection (j) as amended was not set out in the text in the 1977 Cumulative Supplement, but was carried in a note. The amended subsection is therefore set out in this 1978 Interim Supplement.

As the rest of the section was not changed by the amendment, only subsection (j) is set out.

For note on the remedy of garnishment in child support, see 56 N.C.L. Rev. 169 (1978).

Amount Due under Prior Orders, etc. —

When the obligor under a judgment awarding alimony and child support is in arrears in the periodic payment of the alimony and child support the court may, upon motion in the cause, judicially determine the amount then properly

due and enter its final judgment for the total then properly due, and execution may issue thereon. *Lindsey v. Lindsey*, 34 N.C. App. 201, 237 S.E.2d 561 (1977).

No Contempt Proceedings Where Court Did Not Issue Order. — Defendant could not be compelled by contempt proceedings to pay alimony as provided in a separation agreement where the trial court did nothing more than approve or sanction the agreement by incorporating it by reference in the judgment for absolute divorce, and did not order the defendant to make the payments. *Levitch v. Levitch*, 34 N.C. App. 56, 237 S.E.2d 281, petition for review allowed, 293 N.C. 589, 239 S.E.2d 263 (1977).

Unless Decree Constitutes Lien, Arrears Must Be Reduced to Judgment before Execution. — A decree for periodic payments of alimony and support, in the absence of a provision in the decree itself which constitutes it a specific lien upon the property of the obligor, is not enforceable by execution until the arrears are reduced to judgment by a judicial determination of the amount then due. This is so because the decree for alimony and support may be modified as circumstances may justify. *Lindsey v. Lindsey*, 34 N.C. App. 201, 237 S.E.2d 561 (1977).

Cited in *Conrad v. Conrad*, 35 N.C. App. 114, 239 S.E.2d 862 (1978).

§ 50-16.8. Procedure in actions for alimony and alimony pendente lite.

I. IN GENERAL.

No Conflict with Rule 13(a). — There is no

conflict between the statutes dealing with procedure in divorce actions and § 1A-1, Rule

13(a). Rather Rule 13(a) superimposes an additional characteristic on certain kinds of counterclaims. *Gardner v. Gardner*, 294 N.C. 172, 240 S.E.2d 399 (1978).

The statutes dealing specifically with divorce actions do not prescribe a procedure for

counterclaims different from that prescribed in § 1A-1, Rule 13(a). *Gardner v. Gardner*, 294 N.C. 172, 240 S.E.2d 399 (1978).

Cited in *Blake v. Blake*, 34 N.C. App. 160, 237 S.E.2d 310 (1977); *Davis v. Davis*, 35 N.C. App. 111, 240 S.E.2d 488 (1978).

§ 50-16.9. Modification of order.

Editor's Note. —

For note on reinstatement of alimony under a prior divorce decree after annulment of remarriage, see 14 Wake Forest L. Rev. 273 (1978).

Seeking Relief as to Future Payments under Foreign Alimony Decree. — There is no impediment to a defendant's seeking relief as to future alimony payments in an action by a plaintiff for recovery of payments accrued under a foreign alimony decree. However, it is advisable that he should do so by counterclaim specifically alleging a change of circumstances and specifically seeking relief only as to future payments. *Thompson v. Thompson*, 34 N.C. App. 51, 237 S.E.2d 282 (1977).

Trial court's suspension of support payments without proper motion by defendant and without notice in a hearing for defendant to show cause why he should not be held in contempt for failure to pay support deprives plaintiff of her property rights without due process as required by the Fourteenth Amendment to the United States Constitution

and N.C. Const., Art. I, § 19. *Conrad v. Conrad*, 35 N.C. App. 114, 239 S.E.2d 862 (1978).

Transforming Contempt Hearing to Modification Hearing. — The court, on its own motion and without notice to plaintiff, cannot transform a hearing for defendant to show cause why he should not be held in contempt for willful failure to comply with a court order to pay alimony and support into a hearing for modification of such order. *Conrad v. Conrad*, 35 N.C. App. 114, 239 S.E.2d 862 (1978).

Refusal to Hear Evidence for Modification Held Error. — In an action to recover past due alimony payments under a foreign judgment the trial judge erred in refusing to hear evidence offered by the defendant of changed circumstances as it related to possible modification of future payments. *Thompson v. Thompson*, 34 N.C. App. 51, 237 S.E.2d 282 (1977).

Applied in *Lindsey v. Lindsey*, 34 N.C. App. 201, 237 S.E.2d 561 (1977).

Cited in *Bugher v. Bugher*, 34 N.C. App. 601, 239 S.E.2d 303 (1977).

§ 50-17. Alimony in real estate, writ of possession issued.

The court has the power to grant the possession of real estate as a part of alimony.

Upchurch v. Upchurch, 34 N.C. App. 658, 239 S.E.2d 701 (1977).

Chapter 52A.**Uniform Reciprocal Enforcement of Support Act.****§ 52A-1. Short title.****Editor's Note. —**

For survey of 1976 case law on domestic relations, see 55 N.C.L. Rev. 1018 (1977).

§ 52A-4. Remedies additional to those now existing.

Chapter does not establish additional grounds for support. It provides additional means of enforcing support obligations. *Blake v. Blake*, 34 N.C. App. 160, 237 S.E.2d 310 (1977).

The doctrine of res judicata applies to civil actions brought under this Chapter. *Blake v. Blake*, 34 N.C. App. 160, 237 S.E.2d 310 (1977).

§ 52A-5. Obligor present in State is bound.

Chapter does not establish additional grounds for support. It provides additional

means of enforcing support obligations. *Blake v. Blake*, 34 N.C. App. 160, 237 S.E.2d 310 (1977).

§ 52A-8. What duties are applicable.

Chapter does not establish additional grounds for support. It provides additional

means of enforcing support obligations. *Blake v. Blake*, 34 N.C. App. 160, 237 S.E.2d 310 (1977).

§ 52A-12. Duty of the court of this State as responding state.**A proceeding under this Chapter, etc. —**

In accord with original. See *Blake v. Blake*, 34 N.C. App. 160, 237 S.E.2d 310 (1977).

Actions under this Chapter are decided under same law as actions for alimony without

divorce. *Blake v. Blake*, 34 N.C. App. 160, 237 S.E.2d 310 (1977).

The doctrine of res judicata applies to civil actions brought under this Chapter. *Blake v. Blake*, 34 N.C. App. 160, 237 S.E.2d 310 (1977).

Chapter 53.**Banks.****Article 8.****Commissioner of Banks and
State Banking Commission.**

Sec.

53-99. Official records.

Article 9.**Bank Examiners.**

Sec.

53-117. Appointment by Commissioner of
Banks; examination of banks.**ARTICLE 6.*****Powers and Duties.*****§ 53-53. Payment of deposit in the name of minor.****Editor's Note. —**

For article, "The Contracts of Minors Viewed

from the Perspective of Fair Exchange," see 50
N.C.L. Rev. 517 (1972).**ARTICLE 8.*****Commissioner of Banks and State Banking Commission.*****§ 53-99. Official records. —** (a) The Commissioner of Banks shall keep a record in his office of his official acts, rulings, and transactions.

(b) Notwithstanding any laws to the contrary, the following records of the Commissioner of Banks shall be confidential and shall not be disclosed or be subject to public inspection:

- (1) Records compiled during an examination, audit or investigation of any bank, banking office or trust department operating under the provisions of this Chapter.
- (2) Records containing information compiled in preparation or anticipation of litigation.
- (3) Records containing the names of any borrowers from a bank or revealing the collateral given by any such borrower.
- (4) Records prepared during or as a result of an examination, audit or investigation of any bank or banking practice by an agency of the United States, or jointly by such agency and the Commissioner of Banks, if such records would be confidential under any federal law or regulation.
- (5) Any letters, reports, memoranda, recordings, charts, or other documents which would disclose any information set forth in any of the confidential records referred to in subdivisions (1) through (4). (1931, c. 243, s. 10; 1977, 2nd Sess., c. 1181, s. 2.)

Editor's Note. — The 1977, 2nd Sess., amendment rewrote this section.

Session Laws 1977, 2nd Sess., c. 1181, s. 4,

provides that the act shall expire on June 30, 1979 unless repealed by the General Assembly prior thereto.

ARTICLE 9.***Bank Examiners.*****§ 53-117. Appointment by Commissioner of Banks; examination of banks.**

— (a) The Commissioner of Banks, for the purpose of carrying out the provisions of this Chapter, shall appoint from time to time such State bank examiners, assistant State bank examiners, clerks and stenographers as may be necessary to examine the affairs of every bank doing business under this Chapter as often

as the Commissioner of Banks shall deem necessary, and at least once every year; but the Commissioner may extend this period to 18 months when, in his opinion, an emergency condition exists that necessitates such action. The Commissioner of Banks may, at any time, remove any person appointed by him under this Chapter.

(b) The State Banking Commission shall adopt rules and regulations to implement the provisions of this Chapter, prescribing the nature and scope of examination of banks.

(c) The Commissioner of Banks is authorized to accept, in his discretion, as a part of a bank examination, reports on audits conducted in accordance with generally accepted auditing standards by independent accountants, when such reports contain an opinion by the independent accountant on the fairness of presentation of the financial statements and present information required by the rules and regulations of the State Banking Commission. No report of an audit of any bank shall be acceptable under this subsection if such audit was made by a person, firm or corporation who is a director, officer or employee of a bank or has a financial interest, other than as a depositor or obligor upon a fully collateralized loan, in the bank which is the subject of the audit.

(d) In the case of a bank which is a member of the Federal Reserve System or in the case of a bank whose deposits are insured by the Federal Deposit Insurance Corporation, the Commissioner of Banks is authorized to accept, in his discretion, as a part of the examinations prescribed in subsection (b) of this section, examinations and reports made pursuant to the Federal Reserve Act or the Federal Deposit Insurance Corporation Act. (1921, c. 4, s. 72; C. S., s. 223(a); 1931, c. 243, s. 5; 1967, c. 789, s. 17; 1977, c. 684, s. 1; 1977, 2nd Sess., c. 1181, s. 1.)

Editor's Note. —

The 1977, 2nd Sess., amendment designated the former provisions of this section as subsection (a) and added subsections (b), (c) and (d). The amendment also substituted "to examine" for "to make a thorough examination of and into," "shall" for "may" preceding "deem

necessary" and "every" for "each" preceding "year" and made other minor changes in wording in the first sentence of subsection (a).

Session Laws 1977, 2nd Sess., c. 1181, s. 4, provides that the act shall expire on June 30, 1979, unless repealed by the General Assembly prior thereto.

ARTICLE 15.

North Carolina Consumer Finance Act.

§ 53-166. Scope of Article; evasions; penalties; loans in violation of Article void.

Applied in *In re Dickson*, 432 F. Supp. 752 (W.D.N.C. 1977).

§ 53-174. Refund.

Stated in *In re Dickson*, 432 F. Supp. 752 (W.D.N.C. 1977).

§ 53-180. Limitations and prohibitions on practices and agreements.

Selling credit insurance at inflated premiums, receiving a 25% commission, and failing to disclose these facts, while in a fiduciary relationship with the borrower,

constitutes an unfair and deceptive trade practice within the meaning of this section. In *re Dickson*, 432 F. Supp. 752 (W.D.N.C. 1977).

Chapter 54.

Cooperative Organizations.

SUBCHAPTER I. BUILDING AND LOAN ASSOCIATIONS,
BUILDING ASSOCIATIONS AND SAVINGS
AND LOAN ASSOCIATIONS.

ARTICLE 2.

Shares and Shareholders.

§ 54-18. Minors as shareholders.

Editor's Note. — For article, "The Contracts of Minors Viewed from the Perspective of Fair Exchange," see 50 N.C.L. Rev. 517 (1972).

Chapter 55.**Business Corporation Act.****Article 3.****Formation, Name and
Registered Office.****Sec.**

55-146. Service on foreign corporations by
service on Secretary of State.

Sec.

55-15. Service of process on corporation.

Article 10.**Foreign Corporations.**

55-131. Right to transact business.

ARTICLE 3.***Formation, Name and Registered Office.*****§ 55-12. Corporate name.**

Quoted in *State v. Ellis*, 33 N.C. App. 667, 236
S.E.2d 299 (1977).

§ 55-13. Registered office and registered agent.

Cited in *Great Dane Trailers, Inc. v. North
Brook Poultry, Inc.*, 35 N.C. App. 752, 242 S.E.2d
533 (1978).

§ 55-15. Service of process on corporation.

(b) Whenever a corporation shall fail to appoint or maintain a registered agent in this State, or whenever its registered agent cannot with due diligence be found at the registered office, then the Secretary of State shall be an agent of such corporation upon whom any such process, notice, or demand may be served. Service on the Secretary of State of any such process, notice, or demand shall be made by delivering to and leaving with him, or with any clerk having charge of the corporation department of his office, duplicate copies of such process, notice or demand. In the event any such process, notice or demand is served on the Secretary of State, he shall immediately cause one of the copies thereof to be forwarded by registered or certified mail, addressed to the corporation at its registered office. Any such corporation so served shall be in court for all purposes from and after the date of such service on the Secretary of State.

(1977, 2nd Sess., c. 1219, s. 33.)

Editor's Note. — The 1977, 2nd Sess., amendment, effective July 1, 1978, inserted "or certified" in the third sentence of subsection (b).
Session Laws 1977, 2nd Sess., c. 1219, s. 57,

contains a severability clause.

As the rest of the section was not changed by the amendment, only subsection (b) is set out.

ARTICLE 4.***Powers and Management.*****§ 55-37.1. Form of records.**

Editor's Note. — For survey of 1973 case law on the admissibility of computer print-outs, see 52 N.C.L. Rev. 903 (1974).

ARTICLE 6.

*Shareholders.***§ 55-57. Share certificates.**

Cited in State ex rel. Utilities Comm'n v. United Tank Lines, 34 N.C. App. 543, 239 S.E.2d 266 (1977).

§ 55-61. Meetings of shareholders.

Stated in Swenson v. All Am. Assurance Co., 33 N.C. App. 458, 235 S.E.2d 793 (1977).

§ 55-71. Proceeding to determine validity of election or appointment of directors or officers.

Purpose of Section. — This section in its entirety is directed at determining rights and duties resulting from an election held which is contested as to its validity. *Swenson v. All Am. Assurance Co.*, 33 N.C. App. 458, 235 S.E.2d 793 (1977).

The statute is remedial, etc. —

In accord with original. See *Swenson v. All Am. Assurance Co.*, 33 N.C. App. 458, 235 S.E.2d 793 (1977).

The corporation shall continue to function, etc. —

This section provides a method of leaving a

corporation in status quo so the corporate business can be continued while the validity of an election already held is determined. *Swenson v. All Am. Assurance Co.*, 33 N.C. App. 458, 235 S.E.2d 793 (1977).

Section Does Not Apply to Prospective Election Meetings. — The wording of this section clearly indicates that it applies only to contested elections after the fact and not to prospective meetings for the holding of election. *Swenson v. All Am. Assurance Co.*, 33 N.C. App. 458, 235 S.E.2d 793 (1977).

§ 55-73. Shareholders' agreements.

Editor's Note. —

For survey of 1976 case law on commercial law, see 55 N.C.L. Rev. 943 (1977).

ARTICLE 9.

*Dissolution and Liquidation.***§ 55-125. Power of courts to liquidate and decree involuntary dissolution.**

Editor's Note. — For comment discussing alternative remedies to dissolution for the deadlocked corporation, see 51 N.C.L. Rev. 815 (1973).

§ 55-125.1. Discretion of court to grant relief other than dissolution.

Editor's Note. — For comment discussing alternative remedies to dissolution for the deadlocked corporation, see 51 N.C.L. Rev. 815 (1973).

ARTICLE 10.

Foreign Corporations.

§ 55-131. Right to transact business. — (a) A foreign corporation shall procure a certificate of authority from the Secretary of State before it shall transact business in this State. No foreign corporation shall be entitled to procure a certificate of authority under this Chapter to transact in this State any business which a corporation organized under this Chapter is not permitted to transact. A foreign corporation shall not be denied a certificate of authority by reason of the fact that the laws of the state or country under which such corporation is organized governing its organization and internal affairs differ from the laws of this State.

Editor's Note. —

Subsection (a) of this section is set out in order to correct a typographical error in the third sentence of the subsection as it appears in the Replacement Volume.

As the rest of the section was not affected, only subsection (a) is set out.

§ 55-145. Jurisdiction over foreign corporations not transacting business in this State.

Editor's Note. —

For article, "Recognition of Foreign Judgments," see 50 N.C.L. Rev. 21 (1971).

For survey of 1973 case law with regard to in personam jurisdiction over out-of-state

corporations, see 52 N.C.L. Rev. 850 (1974).

For survey of 1976 case law on civil procedure, see 55 N.C.L. Rev. 914 (1977).

Cited in *Fieldcrest Mills, Inc. v. Mohasco Corp.*, 442 F. Supp. 424 (M.D.N.C. 1977).

§ 55-146. Service on foreign corporations by service on Secretary of State. — (a) Service on the Secretary of State, when he is agent of a foreign corporation as provided in this Chapter, of any process, notice or demand shall be made by the sheriff delivering to and leaving with the Secretary of State duplicate copies of such process, notice or demand. Service of process on the foreign corporation shall be deemed complete when the Secretary of State is so served. The Secretary of State shall endorse upon both copies the time of receipt and shall forthwith send one of such copies by registered or certified mail with return receipt requested addressed to such corporation at its principal office as it appears in the records of the Secretary of State or, if there is no address of the corporation on file with the Secretary of State, then to said corporation at its office as shown in the official registry of the state of its incorporation. The Secretary of State may require the plaintiff or his attorney to furnish such address. A copy of the complaint or order of the clerk extending the time for filing the complaint must be mailed to the corporation with the copy of the summons. When a copy of the complaint is not mailed with the summons, the Secretary of State shall mail a copy of the complaint when it is served on him in the same manner as the copy of summons is required to be mailed.

(b) Upon the return to the Secretary of State of the requested return receipt showing delivery and acceptance of such registered or certified mail, or upon the return of such registered or certified mail showing refusal thereof by such foreign corporation, the Secretary of State shall note thereon the date of such return to him and shall attach either the return receipt or such refused mail including the envelope, as the case may be, to the copy of the process, notice or demand theretofore retained by him and shall mail the same to the clerk of the court in which such action or proceeding is pending and in respect of which such process, notice or demand was issued. Such mailing, in addition to the return by the sheriff, shall constitute the due return required by law. The clerk of the court shall thereupon file the same as a paper in such action or proceeding.

(c) Service made under this section shall have the same legal force and validity as if the service had been made personally in this State. The refusal of any such foreign corporation to accept delivery of the registered or certified mail provided for in subsection (a) of this section or the refusal to sign the return receipt shall not affect the validity of such service; and any foreign corporation refusing to accept delivery of such registered or certified mail shall be charged with knowledge of the contents of any process, notice or demand contained therein.

(d) Whenever service of process is made upon the Secretary of State as herein provided the defendant foreign corporation shall have 30 days from the date when the defendant receives or refuses to accept the registered or certified mail containing the copy of the complaint sent as in this section provided in which to appear and answer the complaint in the action or proceeding so instituted. Entries on the defendant's return receipt or the refused registered or certified mail shall be sufficient evidence of such date. If the date of acceptance or refusal to accept the registered or certified mail cannot be determined from the entries on the return receipt or from notations of the postal authorities on the envelope, then the date when the defendant accepted or refused to accept the registered or certified mail shall be deemed to be the date that the return receipt or the registered or certified mail was received back by the Secretary of State.

(1977, 2nd Sess., c. 1219, s. 34.)

Editor's Note. —

The 1977, 2nd Sess., amendment, effective July 1, 1978, inserted "or certified" between "registered" and "mail" in the second sentence of subsection (a), in two places near the beginning of the first sentence in subsection (b),

in two places in the second sentence of subsection (c) and throughout subsection (d).

Session Laws 1977, 2nd Sess., c. 1219, s. 57, contains a severability clause.

As subsections (e), (f) and (g) were not changed by the amendment, they are not set out.

§ 55-154. Transacting business without certificate of authority.

Cited in *Ralph Stachon & Assocs. v. Greenville Broadcasting Co.*, 35 N.C. App. 540, 241 S.E.2d 884 (1978).

Chapter 55A. Nonprofit Corporation Act.

Article 3.

Formation, Name and Registered Office.

Sec.

55A-13. Service of process on corporation.

ARTICLE 3.

Formation, Name and Registered Office.

§ 55A-13. Service of process on corporation.

(b) Whenever a corporation shall fail to appoint or maintain a registered agent in this State, or whenever its registered agent cannot with due diligence be found at the registered office, then the Secretary of State shall be an agent of such corporation upon whom any such process, notice or demand may be served. Service on the Secretary of State of any such process, notice or demand shall be made by delivering to and leaving with him, or with any clerk having charge of the corporation department of his office, duplicate copies of such process, notice or demand. In the event any such process, notice or demand is served on the Secretary of State, he shall immediately cause one of the copies thereof to be forwarded by registered or certified mail, addressed to the corporation at its registered office. Any such corporation so served shall be in court for all purposes from and after the date of such service on the Secretary of State. (1977, 2nd Sess., c. 1219, s. 35.)

Editor's Note. — The 1977, 2nd Sess., amendment, effective July 1, 1978, inserted "or certified" in the third sentence of subsection (b).
Session Laws 1977, 2nd Sess., c. 1219, s. 57,

contains a severability clause.

As the rest of the section was not changed by the amendment, only subsection (b) is set out.

ARTICLE 4.

Powers and Management.

§ 55A-27.1. Form of records.

Editor's Note. — For survey of 1973 case law on the admissibility of computer printouts, see 52 N.C.L. Rev. 903 (1974).

Chapter 58.**Insurance.****SUBCHAPTER V. AUTOMOBILE
INSURANCE.****Article 25A.****North Carolina Motor Vehicle
Reinsurance Facility.**

Sec.

58-248.33. The Facility; functions; administration.

SUBCHAPTER I. INSURANCE DEPARTMENT.**ARTICLE 2.***Commissioner of Insurance.***§ 58-9.3. Court review of orders and decisions.****Editor's Note. —**

For survey of 1976 case law on insurance, see 55 N.C.L. Rev. 1052 (1977).

Types of Decisions Reviewed. — An order by the commissioner in which, without notice or hearing, he abruptly directed that the Automobile Rate Administrative Office could not follow the standard rule of application for placing into effect changes, whether increases or decreases, in insurance premium rates was not such a decision as is described in § 58-9.4, nor does it fall within any of the categories excepted from review by petition to the Superior Court in Wake County under this section. *North Carolina Auto. Rate Administrative Office v. Ingram*, 35 N.C. App. 578, 242 S.E.2d 205 (1978).

Review under Chapter 150A. — Since the scope of review provided in Art. 4, Ch. 150A is substantially broader than that provided by this

section, the scope of judicial review applicable to a denial by the commissioner of insurance of a plan by a domestic insurance company to reorganize under a holding company structure is that provided for in Art. 4 of Ch. 150A. *Occidental Life Ins. Co. v. Ingram*, 34 N.C. App. 619, 240 S.E.2d 460 (1977).

Issuance of Mandatory Injunction Requiring Commissioner to Act. — The trial court did not exceed its power and authority by issuing its mandatory injunction requiring the commissioner of insurance to approve a domestic insurance corporation's plan to reorganize under a holding company structure where the commissioner acted arbitrarily and capriciously when he disapproved the plan. *Occidental Life Ins. Co. v. Ingram*, 34 N.C. App. 619, 240 S.E.2d 460 (1977).

§ 58-9.4. Court review of rates and classification.

Editor's Note. — For survey of 1976 case law on insurance, see 55 N.C.L. Rev. 1052 (1977).

Types of Decisions Reviewed. — An order by the commissioner in which, without notice or hearing, he abruptly directed that the Automobile Rate Administrative Office could not follow the standard rule of application for placing into effect changes, whether increases

or decreases, in insurance premium rates was not such a decision as is described in this section, nor does it fall within any of the categories excepted from review by petition to the Superior Court in Wake County under § 58-9.3(a). *North Carolina Auto. Rate Administrative Office v. Ingram*, 35 N.C. App. 578, 242 S.E.2d 205 (1978).

§ 58-9.5. Procedure on appeal under § 58-9.4.**Editor's Note. —**

For survey of 1976 case law on insurance, see 55 N.C.L. Rev. 1052 (1977).

§ 58-9.6. Extent of review under § 58-9.4.

Applied in State ex rel. Comm'r of Ins. v. North Carolina Auto. Rate Administrative Office, 293 N.C. 365, 239 S.E.2d 48 (1977).

ARTICLE 3.

*General Regulations for Insurance.***§ 58-28. State law governs insurance contracts.****Editor's Note. —**

For article, "Statutes of Limitations in the Conflict of Laws," see 52 N.C.L. Rev. 489 (1974).

§ 58-30. Statements in application not warranties.**Material Representations — As to Attendance of Physicians, Diseases, etc. —**

In an application for a policy of life insurance, written questions relating to health and written answers thereto are deemed material as a matter of law. *Tedder v. Union Fid. Life Ins. Co.*, 436 F. Supp. 847 (E.D.N.C. 1977).

Misrepresentation Need Not Contribute to Loss. —

The materiality of the misrepresentation is judged in terms of its effect upon the insurer's decision to underwrite the risk and therefore, the actual cause of death does not have to be related to the health matters misrepresented. *Tedder v. Union Fid. Life Ins. Co.*, 436 F. Supp. 847 (E.D.N.C. 1977).

False Material Representations, Although Not Fraudulent, etc. —

If the representation is material and false, it

is not necessary for avoidance of the policy that the misrepresentation be intentional. *Tedder v. Union Fid. Life Ins. Co.*, 436 F. Supp. 847 (E.D.N.C. 1977).

Questions for Jury. —

Although it has occasionally been held that the materiality of the misrepresentation is a question of fact for the jury these cases are exceptional and usually involve a dispute as to whether the insured actually had a disease or infirmity at the time of the application or the question of whether the insured's opinion as to his good health was truthful, at least to the insured's knowledge, at the time he applied. *Tedder v. Union Fid. Life Ins. Co.*, 436 F. Supp. 847 (E.D.N.C. 1977).

§ 58-30.3. Discriminatory practices prohibited.

Purpose of This Section and § 58-30.4. — This section and § 58-30.4 were designed to eliminate primary classifications utilizing sex or age as a criterion and to give safe drivers a premium reduction to be offset by increasing the premiums to be paid by inexperienced drivers and those drivers with motor vehicle offenses or chargeable accidents on their records. State ex rel. Comm'r of Ins. v. North Carolina Auto. Rate Administrative Office, 293 N.C. 365, 239 S.E.2d 48 (1977).

The primary purpose of this section and § 58-30.4 was to abolish age and sex as criteria for classifying motor vehicle insurance, both automobile and motorcycle. State ex rel. Comm'r

of Ins. v. North Carolina Auto. Rate Administrative Office, 294 N.C. 60, 241 S.E.2d 324 (1978).

Motorcycles Not Removed from Plans Applicable to Motor Vehicles. — The General Assembly did not by the enactment of this section and § 58-30.4 intend to remove motorcycles from the primary and subclassification plans applicable to motor vehicles generally. State ex rel. Comm'r of Ins. v. North Carolina Auto. Rate Administrative Office, 294 N.C. 60, 241 S.E.2d 324 (1978).

Cited in State ex rel. Comm'r of Ins. v. Motors Ins. Corp., 294 N.C. 360, 241 S.E.2d 332 (1978).

§ 58-30.4. Revised classifications and rates.

Purpose of This Section and § 58-30.3. — This section and § 58-30.3 were designed to eliminate primary classifications utilizing sex or age as a criterion and to give safe drivers a

premium reduction to be offset by increasing the premiums to be paid by inexperienced drivers and those drivers with motor vehicle offenses or chargeable accidents on their records. State ex

rel. Comm'r of Ins. v. North Carolina Auto. Rate Administrative Office, 293 N.C. 365, 239 S.E.2d 48 (1977).

The primary purpose of this section and § 58-30.3 was to abolish age and sex as criteria for classifying motor vehicle insurance, both automobile and motorcycle. State ex rel. Comm'r of Ins. v. North Carolina Auto. Rate Administrative Office, 294 N.C. 60, 241 S.E.2d 324 (1978).

The word "basic" in the phrase "four basic classifications" is used to distinguish the four primary classifications from the surcharge subclassifications. State ex rel. Comm'r of Ins. v. North Carolina Auto. Rate Administrative Office, 293 N.C. 365, 239 S.E.2d 48 (1977).

This section provides for a reclassification, not a reduction or an increase, overall, in rates. State ex rel. Comm'r of Ins. v. North Carolina Auto. Rate Administrative Office, 293 N.C. 365, 239 S.E.2d 48 (1977).

Coverages Included in Collection of Premium Surcharge. — Under this section premiums collected from surcharges must provide not less than (they may provide more) 25% of all premiums realized from all coverages which had theretofore been rated, in part, on the basis of age or sex. This would include premiums

derived from total limits bodily injury and property damage liability coverages, medical payments coverages, and collision coverages. It would not include comprehensive coverages which have not heretofore been classified by rating purposes on the basis of age or sex. State ex rel. Comm'r of Ins. v. North Carolina Auto. Rate Administrative Office, 293 N.C. 365, 239 S.E.2d 48 (1977) (decided prior to 1977 amendment).

Motorcycles Not Removed from Plans Applicable to Motor Vehicles. — The General Assembly did not by the enactment of this section and § 58-30.3 intend to remove motorcycles from the primary and subclassification plans applicable to motor vehicles generally. State ex rel. Comm'r of Ins. v. North Carolina Auto. Rate Administrative Office, 294 N.C. 60, 241 S.E.2d 324 (1978).

The legislature intended to classify and subclassify motorcycles in the same manner as automobiles for insurance rate-making purposes. State ex rel. Comm'r of Ins. v. North Carolina Auto. Rate Administrative Office, 294 N.C. 60, 241 S.E.2d 324 (1978).

Cited in State ex rel. Comm'r of Ins. v. Motors Ins. Corp., 294 N.C. 360, 241 S.E.2d 332 (1978).

§ 58-31. Stipulations as to jurisdiction and limitation of actions.

Editor's Note. — For article, "Statutes of Limitations in the Conflict of Laws," see 52 N.C.L. Rev. 489 (1974).

ARTICLE 4.

Insurance Premium Financing.

§ 58-56.1. Exceptions to license requirements.

Editor's Note. —

For survey of 1976 case law on insurance, see 55 N.C.L. Rev. 1052 (1977).

SUBCHAPTER II. INSURANCE COMPANIES.

ARTICLE 6A.

Exchange of Stock.

§ 58-86.3. Exchange of securities.

Proper for Insurance Company to Have Holding Company Structure. — By enacting this article the General Assembly has recognized, and in so doing has established as the public policy of this State, that it is entirely proper for a domestic insurance company and its

stockholders to enjoy the benefits of a corporate reorganization so as to bring their company under a holding company structure, provided the protective procedures prescribed in the article are followed. Occidental Life Ins. Co. v. Ingram, 34 N.C. App. 619, 240 S.E.2d 460 (1977).

§ 58-86.4. Procedure for exchange.

Notice and Hearing Required. — Because there may be circumstances in which a corporate reorganization might work to the detriment of the domestic insurance company or its shareholders or policyholders, this section provides that the corporate reorganization can be accomplished only after notice is given to all shareholders and to the public of a public hearing which the commissioner of insurance is directed to hold. *Occidental Life Ins. Co. v. Ingram*, 34 N.C. App. 619, 240 S.E.2d 460 (1977).

Commissioner Must Act in Good Faith. — A clearly implied condition upon the powers conferred upon the Commissioner by this section is that he will exercise them in good faith. *Occidental Life Ins. Co. v. Ingram*, 34 N.C. App. 619, 240 S.E.2d 460 (1977).

And Not Arbitrarily. — The powers conferred upon the Commissioner of Insurance by this section are not so broad as to permit him arbitrarily to refuse to make findings favorable to petitioners when all of the evidence supports such findings and there is no competent evidence to the contrary. *Occidental Life Ins. Co. v. Ingram*, 34 N.C. App. 619, 240 S.E.2d 460 (1977).

The Commissioner of Insurance abused the powers granted to him by the General Assembly when he arbitrarily and capriciously denied a domestic insurance company's plan to reorganize under a holding company structure where all of the competent evidence showed they were clearly entitled to reorganization. *Occidental Life Ins. Co. v. Ingram*, 34 N.C. App. 619, 240 S.E.2d 460 (1977).

If the commissioner acts arbitrarily, petitioners are not left helpless, nor are the courts powerless to grant them adequate relief. *Occidental Life Ins. Co. v. Ingram*, 34 N.C. App. 619, 240 S.E.2d 460 (1977).

Issuance of Mandatory Injunction Requiring Commissioner to Act. — The trial court did not exceed its power and authority by issuing its mandatory injunction requiring the commissioner of insurance to approve a domestic insurance corporation's plan to reorganize under a holding company structure where the commissioner acted arbitrarily and capriciously when he disapproved the plan. *Occidental Life Ins. Co. v. Ingram*, 34 N.C. App. 619, 240 S.E.2d 460 (1977).

ARTICLE 12B.*North Carolina Rate Bureau.***§ 58-124.21. Disapproval; hearing, order; adjustment of premium, review of filing.**

Cited in *State ex rel. Comm'r of Ins. v. North Carolina Auto. Rate Administrative Office*, 294 N.C. 60, 241 S.E.2d 324 (1978).

ARTICLE 13C.*Regulation of Insurance Rates.***§ 58-131.35. Definitions.**

Quoted in *State ex rel. Comm'r of Ins. v. North Carolina Auto. Rate Administrative Office*, 294 N.C. 60, 241 S.E.2d 324 (1978).

§ 58-131.42. Disapproval of rates; interim use of rates.

Quoted in *State ex rel. Comm'r of Ins. v. North Carolina Auto. Rate Administrative Office*, 294 N.C. 60, 241 S.E.2d 324 (1978).

ARTICLE 17A.

Mergers, Rehabilitation and Liquidation of Insurance Companies.

§ 58-155.2. Grounds for rehabilitation.

The commissioner as rehabilitator has discretionary as well as ministerial powers.

State ex rel. Ingram v. All Am. Assurance Co., 34 N.C. App. 517, 239 S.E.2d 474 (1977).

§ 58-155.3. Order of rehabilitation; termination.

"Step toward Removal of the Causes". — The settlement of an outstanding debt by the rehabilitator is clearly a step "toward removal of the causes and conditions which have made

rehabilitation necessary as the court may direct." State ex rel. Ingram v. All Am. Assurance Co., 34 N.C. App. 517, 239 S.E.2d 474 (1977).

§ 58-155.11. Conduct of delinquency proceedings against insurers domiciled in this State.

Subsection (f) gives to the rehabilitator the power to appoint special counsel and to collect his fees directly out of the insurer's funds,

subject to the approval of the court. State ex rel. Ingram v. All Am. Assurance Co., 34 N.C. App. 517, 239 S.E.2d 474 (1977).

§ 58-155.18. Commencement of proceedings.

The trial court has broad supervisory powers and must also be held to have broad initiative powers as well so as to effect the mandate of such provisions as this section which directs the court after full hearing to deny or grant the application for rehabilitation "together with such other relief as the nature of the case and the interests of policyholders, creditors, stockholders, members, subscribers or the public may require." State ex rel. Ingram v.

All Am. Assurance Co., 34 N.C. App. 517, 239 S.E.2d 474 (1977).

Authority to Order Payment of Fair Compensation to Counsel. — The supervisory power of the trial court in a rehabilitation suit includes the authority to order that the insurer pay fair and reasonable compensation to its counsel of record for legal services rendered. State ex rel. Ingram v. All Am. Assurance Co., 34 N.C. App. 517, 239 S.E.2d 474 (1977).

SUBCHAPTER III. FIRE INSURANCE.

ARTICLE 18C.

North Carolina Health Care Liability Reinsurance Exchange.

§ 58-173.34. Declarations and purpose of the Article.

Editor's Note. —

For survey of 1976 case law on constitutional law, see 55 N.C.L. Rev. 965 (1977).

ARTICLE 19.

Fire Insurance Policies.

§ 58-176. Fire insurance contract; standard policy provisions.

Editor's Note. —

For article, "Statutes of Limitations in the Conflict of Laws," see 52 N.C.L. Rev. 489 (1974).

Cited in Greenway v. North Carolina Farm Bureau Mut. Ins. Co., 35 N.C. App. 308, 241 S.E.2d 339 (1978).

§ 58-177. Standard policy; permissible variations.

The word "restrictive" in subdivision (3) of this section, construed in light of the statutory object and not in a narrow or technical sense, was intended to cover any clause or provision included in or appended to the standard fire policy whereby an essential provision of the standard fire policy, materially influencing the rights of the insured, is limited or modified. *Greenway v. North Carolina Farm Bureau Mut. Ins. Co.*, 35 N.C. App. 308, 241 S.E.2d 339 (1978).

Limiting Provisions. — An insurer may insure only such properties as are situated outside the limits set out in a limiting provision, which provision is descriptive, not restrictive, of the standard coverage. What an insurer may not do is promise general coverage, receive appropriate premium payment and then restrict coverage by a restrictively limiting provision. *Greenway v. North Carolina Farm Bureau Mut. Ins. Co.*, 35 N.C. App. 308, 241 S.E.2d 339 (1978).

SUBCHAPTER IV. LIFE INSURANCE.**ARTICLE 22.***General Regulations of Business.*

§ 58-205.1. Minors may enter into insurance or annuity contracts and have full rights, powers and privileges thereunder.

Editor's Note. — For article, "The Contracts of Minors Viewed from the Perspective of Fair Exchange," see 50 N.C.L. Rev. 517 (1972).

SUBCHAPTER V. AUTOMOBILE INSURANCE.**ARTICLE 25A.***North Carolina Motor Vehicle Reinsurance Facility.*

§ 58-248.33. The Facility; functions; administration. —

(b) The Facility shall reinsure for each coverage available therein to the standard percentage of one hundred percent (100%) or lesser equitable percentage established in the plan of operation as follows:

- (1) For the following coverages of motor vehicle insurance and in at least the following amounts of insurance:
 - a. Bodily injury liability: twenty-five thousand dollars (\$25,000) each person, fifty thousand dollars (\$50,000) each accident;
 - b. Property damage liability: ten thousand dollars (\$10,000) each accident;
 - c. Medical payments: one thousand dollars (\$1,000) each person; except that this coverage shall not be available for motorcycles;
 - d. Uninsured motorist: twenty-five thousand dollars (\$25,000) each person; fifty thousand dollars (\$50,000) each accident for bodily injury; five thousand dollars (\$5,000) each accident property damage (one hundred dollars (\$100.00) deductible);
 - e. Any other motor vehicle insurance limits in the amount required by any law or regulatory agency regulation for those motor carriers who furnish proof of insurance or file certificates of insurance with any regulatory agency in order to comply with the security or other financial responsibility requirements of the North Carolina Utilities Commission and the United States Interstate Commerce Commission.

- (2) Additional ceding privileges for motor vehicle insurance shall be provided by the Board of Governors if there is a substantial public

demand for a coverage or coverage limit of any component of motor vehicle insurance up to the following:

Bodily injury liability: one hundred thousand dollars (\$100,000) each person, three hundred thousand dollars (\$300,000) each accident

Property damage liability: fifty thousand dollars (\$50,000) each accident

Medical payments: two thousand dollars (\$2,000) each person

Uninsured motorist: one hundred thousand dollars (\$100,000) each person and each accident for bodily injury and five thousand dollars (\$5,000) for property damage (one hundred dollars (\$100.00) deductible).

Any other motor vehicle insurance required by law: in twice the amount of coverage limits required by law.

- (3) Whenever the additional ceding privileges are provided as in G.S. 58-248.33(b)(2) for any component of motor vehicle insurance, the same additional ceding privileges shall be available to "all other" types of risks subject to the rating jurisdiction of the North Carolina Automobile Rate Administrative Office.

(1977, 2nd Sess., c. 1135.)

Editor's Note. —

The 1977, 2nd Sess., amendment, effective October 1, 1978, added paragraph e to

subdivision (b)(1).

As the rest of the section was not changed by the amendment, only subsection (b) is set out.

Chapter 62.**Public Utilities.****Article 7.****Rates of Public Utilities.**

Sec.

62-140. Discrimination prohibited.

Article 14.**Fees and Charges.**62-300. Particular fees and charges fixed;
payment.**ARTICLE 1.***General Provisions.***§ 62-2. Declaration of policy.**

Editor's Note. — For survey of 1976 case law dealing with administrative law, see 55 N.C.L. Rev. 898 (1977).

ARTICLE 5.*Review and Enforcement of Orders.***§ 62-94. Record on appeal; extent of review.****I. GENERAL CONSIDERATION.****Subsection (b) States Authority of Court. —**

The decision of the commission with regard to rates for public utilities will be upheld by the Court of Appeals on appeal unless it is assailable on one of the grounds enumerated in subsection (b) of this section. State ex rel. Util. Comm'n v. Mebane Home Tel. Co., 35 N.C. App. 588, 242 S.E.2d 165 (1978).

Weighting of Evidence, etc. —

The credibility of the evidence and the weight to be given it was for the determination of the commission. State ex rel. Utilities Comm'n v. Farmers Chem. Ass'n, 33 N.C. App. 433, 235 S.E.2d 398, cert. denied, 293 N.C. 258, 237 S.E.2d 539 (1977).

Commission's Findings Are Conclusive, etc. —

When the commission's findings are

supported by competent, material and substantial evidence, they are binding upon the appellate court. State ex rel. Utilities Comm'n v. Farmers Chem. Ass'n, 33 N.C. App. 433, 235 S.E.2d 398, cert. denied, 293 N.C. 258, 237 S.E.2d 539 (1977).

The authority of an appellate court, etc. —

In accord with 1977 Cum. Supp. See State ex rel. Utilities Comm'n v. Farmers Chem. Ass'n, 33 N.C. App. 433, 235 S.E.2d 398, cert. denied, 293 N.C. 258, 237 S.E.2d 539 (1977).

Cited in State ex rel. Utilities Comm'n v. Public Serv. Co. of N.C., Inc., 35 N.C. App. 156, 241 S.E.2d 79 (1978).

ARTICLE 6.*The Utility Franchise.***§ 62-111. Transfer of franchises; mergers, consolidations and combinations of public utilities.**

Applied in State ex rel. Utilities Comm'n v. United Tank Lines, 34 N.C. App. 543, 239 S.E.2d 266 (1977).

§ 62-112. Effective date, suspension and revocation of franchises; dormant motor carrier franchises.

Applied in State ex rel. Utilities Comm'n v. United Tank Lines, 34 N.C. App. 543, 239 S.E.2d 266 (1977).

ARTICLE 7.

Rates of Public Utilities.

§ 62-132. Rates established under this Chapter deemed just and reasonable; remedy for collection of unjust or unreasonable rates.

Editor's Note. — For survey of 1976 case law dealing with administrative law, see 55 N.C.L. Rev. 898 (1977).

§ 62-133. How rates fixed.

I. GENERAL CONSIDERATION.

Editor's Note. —

For survey of 1972 case law on public utility rate regulation, see 51 N.C.L. Rev. 1140 (1973).

For survey of 1974 case law on public utilities, see 53 N.C.L. Rev. 1083 (1975).

For survey of 1976 case law dealing with administrative law, see 55 N.C.L. Rev. 898 (1977).

II. UTILITIES COMMISSION.

The Responsibility for Fixing Rates, etc.

It is the commission's duty to sift through the evidence and draw a conclusion therefrom as to a fair and reasonable rate of return. *State ex rel. Util. Comm'n v. Mebane Home Tel. Co.*, 35 N.C. App. 588, 242 S.E.2d 165 (1978).

The findings of the Commission, when supported, etc. —

If there is competent evidence to support the findings and conclusions of the commission, they will be upheld by the reviewing court. *State ex rel. Util. Comm'n v. Mebane Home Tel. Co.*, 35 N.C. App. 588, 242 S.E.2d 165 (1978).

Reversing Determination of Commission. —

The decision of the commission with regard to

rates for public utilities will be upheld by the Court of Appeals on appeal unless it is assailable on one of the grounds enumerated in § 62-94(b). *State ex rel. Util. Comm'n v. Mebane Home Tel. Co.*, 35 N.C. App. 588, 242 S.E.2d 165 (1978).

The commission's findings, supported by substantial evidence, may not properly be set aside by the reviewing court merely because a different conclusion could have been reached upon the evidence. *State ex rel. Util. Comm'n v. Mebane Home Tel. Co.*, 35 N.C. App. 588, 242 S.E.2d 165 (1978).

III. FIXING OF RATES.

B. Rate Base — Value of Investments, Property, etc.

Balance on Review. —

In accord with 4th paragraph in original. See *State ex rel. Util. Comm'n v. Mebane Home Tel. Co.*, 35 N.C. App. 588, 242 S.E.2d 165 (1978).

When Commission's Findings of Fair Value, etc. —

In accord with original. See *State ex rel. Util. Comm'n v. Mebane Home Tel. Co.*, 35 N.C. App. 588, 242 S.E.2d 165 (1978).

§ 62-134. Change of rates; notice; suspension and investigation.

Commission's findings, supported by substantial evidence, may not properly be set aside by the reviewing court merely because a different conclusion could have been reached upon the evidence. *State ex rel. Util. Comm'n v. Mebane Home Tel. Co.*, 35 N.C. App. 588, 242 S.E.2d 165 (1978).

Decision Upheld unless Assailable under § 62-94(b). — The decision of the commission

with regard to rates for public utilities will be upheld by the Court of Appeals on appeal unless it is assailable on one of the grounds enumerated in § 62-94(b). *State ex rel. Util. Comm'n v. Mebane Home Tel. Co.*, 35 N.C. App. 588, 242 S.E.2d 165 (1978).

Cited in *State ex rel. Comm'r of Ins. v. North Carolina Auto. Rate Administrative Office*, 294 N.C. 60, 241 S.E.2d 324 (1978).

§ 62-140. Discrimination prohibited. — (a) No public utility shall, as to rates or services, make or grant any unreasonable preference or advantage to any person or subject any person to any unreasonable prejudice or disadvantage. No public utility shall establish or maintain any unreasonable difference as to rates or services either as between localities or as between classes of service. The Commission may determine any questions of fact arising under this section provided that it shall not be an unreasonable preference or advantage or constitute discrimination against any person, firm or corporation or general rate payer for telephone utilities to contract with motels, hotels and hospitals to pay reasonable commissions in connection with the handling of intrastate toll calls charged to a guest or patient and collected by the motel, hotel or hospital; provided further, that payment of such commissions shall be in accordance with uniform tariffs which shall be subject to the approval of the Commission.

(1977, 2nd Sess., c. 1146.)

Editor's Note. —

The 1977, 2nd Sess., amendment added the two provisos at the end of the last sentence of subsection (a).

As the rest of the section was not changed by

the amendment, only subsection (a) is set out.

Cited in State ex rel. Utilities Comm'n v. Farmers Chem. Ass'n, 33 N.C. App. 433, 235 S.E.2d 398 (1977).

ARTICLE 14.

Fees and Charges.

§ 62-300. Particular fees and charges fixed; payment. — (a) The Commission shall receive and collect the following fees and charges in accordance with the classification of utilities as provided in rules and regulations of the Commission, and no others:

- (1) Twenty-five dollars (\$25.00) with each notice of appeal to the Court of Appeals, and with each notice of application for a writ of certiorari.
- (2) With each application for a new certificate or new permit for motor and rail carrier rights, the fee shall be two hundred fifty dollars (\$250.00) when filed by Class 1 motor and rail carriers, one hundred dollars (\$100.00) when filed by Class 2 motor and rail carriers, and twenty-five dollars (\$25.00) when filed by Class 3 motor and rail carriers, and twenty-five dollars (\$25.00) as filing fee for any amendment thereto so as to extend or enlarge the scope of operations thereunder, and twenty-five dollars (\$25.00) for each broker who applies for a brokerage license under the provisions of this Chapter.
- (3) With each application for a general increase in rates, fares and charges and for each filing of a tariff which seeks general increases in rates, fares and charges, the fee will be five hundred dollars (\$500.00) for Class A utilities and Class 1 motor and rail carriers, two hundred fifty dollars (\$250.00) for Class B utilities and Class 2 motor and rail carriers, one hundred dollars (\$100.00) for Class C utilities and twenty-five dollars (\$25.00) for Class D utilities and Class 3 motor and rail carriers; provided that in the case of an application or tariff for a general increase in rates filed by a tariff agent for more than one carrier, the applicable fee shall be the highest fee prescribed for any motor carrier included in the application or tariff. This fee shall not apply to applications for adjustments in particular rates, fares, or charges for the purpose of eliminating inequities, preferences or discriminations or to applications to adjust rates and charges based solely on the increased cost of fuel used in the generation or production of electric power.
- (4) One hundred dollars (\$100.00) with each application for discontinuance of train service, or for a change in or discontinuance of station facilities

and with each application by a motor carrier of passengers for the abandonment or permanent or temporary discontinuance of transportation service previously authorized in a certificate.

- (5) With each application for a certificate of public convenience and necessity or for any amendment thereto so as to extend or enlarge the scope of operations thereunder, the fee shall be two hundred fifty dollars (\$250.00) for Class A utilities, one hundred dollars (\$100.00) for Class B utilities, and twenty-five dollars (\$25.00) for Class C and D utilities.
- (6) With each application for approval of the issuance of securities or for the approval of any sale, lease, hypothecation, lien, or other transfer of any property or operating rights of any carrier or public utility over which the Commission has jurisdiction, the fee shall be two hundred fifty dollars (\$250.00) for Class A utilities and Class 1 motor and rail carriers, one hundred dollars (\$100.00) for Class B utilities and Class 2 motor and rail carriers, and twenty-five dollars (\$25.00) for Class C and D utilities and Class 3 motor and rail carriers; provided, that in the case of sales, leases and transfers between two or more carriers or utilities, the applicable fee shall be the highest fee prescribed for any party to the transaction.
- (7) Ten dollars (\$10.00) with each application, petition, or complaint not embraced in (2) through (6) of this section, wherein such application, petition, or complaint seeks affirmative relief against a carrier or public utility over which the Commission has jurisdiction. This fee shall not apply to applications for adjustments in particular rates, fares or charges for the purpose of eliminating inequities, preferences or discriminations; nor shall this fee apply to applications, petitions, or complaints made by any county, city or town; nor shall this fee apply to applications or petitions made by individuals seeking service from a public utility.
- (8) One dollar (\$1.00) for the registration with the Commission of each motor vehicle to be put in operation by a motor carrier operating under the jurisdiction of the Commission, and a fee of one dollar (\$1.00) for the annual reregistration of each such motor vehicle.
- (9) Fifty cents (50¢) for each page (8½ x 11 inches) of transcript of testimony, but not less than five dollars (\$5.00) for any such transcript.
- (10) Twenty cents (20¢) for each page reproduced by photostatic or similar process and for each page of an order which can be made available without the necessity of copying or reproduction.
- (11) Twenty-five dollars (\$25.00) for the filing with the Commission of the interstate motor carrier operating authority or registration of interstate exempt operation of every motor carrier operating into, from, within, or through North Carolina and filed with the Commission under the provisions of G.S. 62-266 and five dollars (\$5.00) for filing all subsequent amendments thereto to maintain said filing in a current status.
- (12) One dollar (\$1.00) for the registration with the Commission of each motor vehicle operated into, from, within, or through North Carolina by interstate carriers and registered with the Commission under the provisions of G.S. 62-266, and a fee of one dollar (\$1.00) for the annual reregistration of each such motor vehicle.

(1977, 2nd Sess., c. 1219, s. 32.)

Editor's Note. —

The 1977, 2nd Sess., amendment, effective July 1, 1978, substituted "Fifty cents (50¢)" for "One dollar (\$1.00)" at the beginning subdivision (a)(9).

Session Laws 1977, 2nd Sess., c. 1219, s. 57, contains a severability clause.

As the rest of the section was not changed by the amendment, only subsection (a) is set out.

ARTICLE 15.

*Penalties and Actions.***§ 62-310. Public utility violating any provision of Chapter, rules or orders penalty; enforcement by injunction.**

Cited in State ex rel. Utilities Comm'n v. United Tank Lines, 34 N.C. App. 543, 239 S.E.2d 266 (1977).

Chapter 63.**Aeronautics.****ARTICLE 1.***Municipal Airports.***§ 63-4. Joint airports established by cities and towns and counties.**

Local Modification. — City of Laurinburg
and Town of Maxton: 1977 (2nd Sess.), c. 1166.

Chapter 66.**Commerce and Business.****ARTICLE 15.***Person Trading as "Company" or "Agent."***§ 66-72. Person trading as "company" or "agent" to disclose real parties**

Editor's Note. — For a note on consignments requirements, see 13 Wake Forest L. Rev. 501 (1977).
and the consignor's duty to satisfy public notice

Chapter 71.

Indians.

§§ 71-1 to 71-20: Repealed by Session Laws 1977, c. 849, s. 1, effective July 1, 1977.

Cross Reference. —

For present statute partially covering the subject matter of repealed §§ 71-1 to 71-12, see §§ 71A-1 to 71A-6.

Chapter 71A.

Indians.

Sec.	Sec.
71A-1. Cherokee Indians of Robeson County; rights and privileges.	Carolina; rights, privileges, immunities, obligations and duties.
71A-2. Chapter not applicable to certain bands of Cherokees.	71A-5. Haliwa Tribe of North Carolina; rights, privileges, immunities, obligations and duties.
71A-3. Lumbee Tribe of North Carolina; rights, privileges, immunities, obligations and duties.	71A-6. Coharie Tribe of North Carolina; rights, privileges, immunities, obligations and duties.
71A-4. Waccamaw Siouan Tribe of North	

§ 71A-1. Cherokee Indians of Robeson County; rights and privileges. — The persons residing in Robeson, Richmond, and Sampson counties, who have heretofore been known as “Croatan Indians” or “Indians of Robeson County,” together with their descendants, shall hereafter be known and designated as “Cherokee Indians of Robeson County,” and by that name shall be entitled to all the rights and privileges heretofore or hereafter conferred, by any law or laws of the State of North Carolina, upon the Indians heretofore known as the “Croatan Indians” or “Indians of Robeson County.” In all laws enacted by the General Assembly of North Carolina relating to said Indians subsequent to the enactment of said Chapter 51 of the Laws of 1885, the words “Croatan Indians” and “Indians of Robeson County” are stricken out and the words “Cherokee Indians of Robeson County” inserted in lieu thereof. (1885, c. 51, s. 2; Rev., s. 4168; 1911, c. 215; P.L. 1911, c. 263; 1913, c. 123; C.S., s. 6257; 1977, 2nd Sess., c. 1193, s. 1.)

Cross Reference. — As to the North Carolina State Commission of Indian Affairs, see §§ 143B-404 to 143B-411.

§ 71A-2. Chapter not applicable to certain bands of Cherokees. — Neither this Chapter nor any other act relating to said “Cherokee Indians of Robeson County” shall be construed so as to impose on said Indians any powers, privileges, rights, or immunities, or any limitations on their power to contract, heretofore enacted with reference to the Eastern Band of Cherokee Indians residing in Cherokee, Graham, Jackson, Swain and other adjoining counties in North Carolina, or any other band or tribe of Cherokee Indians other than those now residing, or who have since the Revolutionary War resided, in Robeson County, nor shall said “Cherokee Indians of Robeson County,” as herein designated, be subject to the limitations provided in the Chapter Contracts Requiring Writing, G.S. 22-3, entitled Contracts with Cherokee Indians. (1947, c. 978, s. 1; 1977, 2nd Sess., c. 1193, s. 1.)

§ 71A-3. Lumbee Tribe of North Carolina; rights, privileges, immunities, obligations and duties. — The Indians now residing in Robeson and adjoining counties of North Carolina, originally found by the first white settlers on the Lumbee River in Robeson County, and claiming joint descent from remnants of early American Colonists and certain tribes of Indians originally inhabiting the coastal regions of North Carolina, shall, from and after April 20, 1953, be designated and officially recognized as Lumbee Tribe of North Carolina and shall continue to enjoy all rights, privileges and immunities enjoyed by them as citizens of the State as now provided by law, and shall continue to be subject to all the obligations and duties of citizens under the law. (1953, c. 874; 1977, 2nd Sess., c. 1193, s. 1.)

§ 71A-4. Waccamaw Siouan Tribe of North Carolina; rights, privileges, immunities, obligations and duties. — The Indians now living in Bladen and Columbus and adjoining counties of North Carolina, originally found by the first white settlers in the region of the Cape Fear River, Lake Waccamaw, and the Waccamaw Indians, a Siouan Tribe which inhabited the areas surrounding the Waccamaw, Pee Dee, and Lumber Rivers in North and South Carolina, shall, from and after July 20, 1971, be designated and officially recognized as the Waccamaw Siouan Tribe of North Carolina and shall continue to enjoy all their rights, privileges and immunities as citizens of the State as now or hereafter provided by law, and shall continue to be subject to all the obligations and duties of citizens under the law. (1977, 2nd Sess., c. 1193, s. 1.)

§ 71A-5. Haliwa Tribe of North Carolina; rights, privileges, immunities, obligations and duties. — The Indians now residing in Halifax, Warren and adjoining counties of North Carolina, originally found by the first permanent white settlers on the Roanoke River in Halifax and Warren Counties, and claiming descent from certain tribes of Indians originally inhabiting the coastal regions of North Carolina, shall, from and after April 15, 1965, be designated and officially recognized as the Haliwa Tribe of North Carolina, and they shall continue to enjoy all their rights, privileges and immunities as citizens of the State as now or hereafter provided by law, and shall continue to be subject to all the obligations and duties of citizens under the law. (1965, c. 254; 1977, 2nd Sess., c. 1193, s. 1.)

§ 71A-6. Coharie Tribe of North Carolina; rights, privileges, immunities, obligations and duties. — The Indians now living in Harnett and Sampson and adjoining counties of North Carolina, originally found by the first white settlers on the Coharie River in Sampson County, and claiming descent from certain tribes of Indians originally inhabiting the coastal regions of North Carolina, shall, from and after July 20, 1971, be designated and officially recognized as the Coharie Tribe of North Carolina and shall continue to enjoy all their rights, privileges and immunities as citizens of the State as now or hereafter provided by law, and shall continue to be subject to all the obligations and duties of citizens under the law. (1977, 2nd Sess., c. 1193, s. 1.)

Chapter 75.**Monopolies, Trusts and Consumer Protection.****ARTICLE 1.***General Provisions.***§ 75-1. Combinations in restraint of trade illegal.****Editor's Note. —**

For note on price discrimination in North Carolina, see 53 N.C.L. Rev. (1974).

§ 75-1.1. Methods of competition, acts and practices regulated; legislative policy.**Editor's Note. —**

For comment on retaliatory eviction in landlord-tenant relations, see 54 N.C.L. Rev. 861 (1976).

For note discussing the role of the jury in applying deceptive trade practices legislation, see 54 N.C.L. Rev. 963 (1976).

For survey of 1976 case law on commercial law, see 55 N.C.L. Rev. 943 (1977).

For comment discussing the effect of the 1977 amendment to this section, see 56 N.C.L. Rev. 547 (1978).

The phrase "learned profession" applies to physicians, attorneys, clergy, and related professions. Opinion of Attorney General to Representative Robert L. Farmer, 47 N.C.A.G. 118 (1977).

The rental of residential housing is "trade or commerce" under this section. Love v. Pressley, 34 N.C. App. 503, 239 S.E.2d 574 (1977).

The 1977 amendment to this section greatly broadened its scope. Love v. Pressley, 34 N.C. App. 503, 239 S.E.2d 574 (1977).

Mere allegation of intentional refusal to procure and deliver natural gas, without any suggestion of deception or any claim of injury

to competition, does not state a claim under this section. CF Indus., Inc. v. Transcontinental Gas Pipe Line Corp., 448 F. Supp. 475 (W.D.N.C. 1978).

Jury Decides Facts. — In cases under this section it is ordinarily the province of the jury to find the facts. Love v. Pressley, 34 N.C. App. 503, 239 S.E.2d 574 (1977).

And Court Determines Whether Practice Violates Section. — Whether an act or practice is unfair or deceptive within the meaning of this section is a question of law for the court to determine. CF Indus., Inc. v. Transcontinental Gas Pipe Line Corp., 448 F. Supp. 475 (W.D.N.C. 1978).

Based on the jury's findings of fact, the court must determine as a matter of law whether a defendant's conduct violates this section. Love v. Pressley, 34 N.C. App. 503, 239 S.E.2d 574 (1977).

Cited in Travelers Ins. Co. v. Ryder Truck Rental, Inc., 34 N.C. App. 379, 238 S.E.2d 193 (1977); Fieldcrest Mills, Inc. v. Mohasco Corp., 442 F. Supp. 424 (M.D.N.C. 1977); Greenway v. North Carolina Farm Bureau Mut. Ins. Co., 35 N.C. App. 308, 241 S.E.2d 339 (1978).

§ 75-5. Particular acts prohibited.**Editor's Note. —**

For note on price discrimination in North Carolina, see 53 N.C.L. Rev. (1974).

§ 75-15.2. Civil penalty.**Editor's Note. —**

For comment on this section, see 56 N.C.L. Rev. 547 (1978).

§ 75-16. Civil action by person injured; treble damages.

One-Year Limitation Applies. — An action for treble damages under this section is an action for a penalty subject to the one-year limitation of § 1-54. *CF Indus., Inc. v. Transcontinental Gas Pipe Line Corp.*, 448 F. Supp. 475 (W.D.N.C. 1978).

Cited in *Travelers Ins. Co. v. Ryder Truck Rental, Inc.*, 34 N.C. App. 379, 238 S.E.2d 193 (1977); *Love v. Pressley*, 34 N.C. App. 503, 239 S.E.2d 574 (1977); *Greenway v. North Carolina Farm Bureau Mut. Ins. Co.*, 35 N.C. App. 308, 241 S.E.2d 339 (1978).

§ 75-16.1. Attorney fee.

Cited in *CF Indus., Inc. v. Transcontinental Gas Pipe Line Corp.*, 448 F. Supp. 475 (W.D.N.C. 1978).

ARTICLE 2.

Prohibited Acts by Debt Collectors.

§ 75-50. Definitions.

Editor's Note.—
For comment on this article, see 56 N.C.L. Rev. 547 (1978).

Chapter 78A.**North Carolina Securities Act.****Article 3.**

Sec.

Exemptions.

78A-48. Judicial review of orders.

Sec.

78A-17. Exempt transactions.

Article 6.**Administration and Review.**

78A-46. Investigations and subpoenas.

ARTICLE 3.*Exemptions.*

§ 78A-17. **Exempt transactions.** — The following transactions are exempted from G.S. 78A-24 and G.S. 78A-49(d):

- (9) a. Any transaction pursuant to an offer directed by the offeror to not more than 25 persons (other than those designated in subdivision (8)) in this State during any period of 12 consecutive months, whether or not the offeror or any of the offerees is then present in this State, if the seller reasonably believes that all the buyers in this State are purchasing for investment; provided, however, the Administrator may by rule or order as to any security or transaction, withdraw or further condition this exemption; or
 - b. Any transaction that is exempted from the provisions of section 5 of the Securities Act of 1933 by virtue of any rule, or rules, promulgated, either before or after April 1, 1975, by the Securities and Exchange Commission under section 4(2) of such act;
- (1977, c. 610, s. 1.)

Editor's Note. — The 1977 amendment, effective April 1, 1978, divided the former provisions of subdivision (9) into paragraphs a and b by substituting "or" at the end of present paragraph a for "provided further, the Administrator may by rule or order exempt," substituted "other than" for "including" in paragraph a, and deleted "or type of transaction" following "Any transaction" in paragraph b.

Because of the postponed effective date of the 1977 amendment, subdivision (9) as amended was not set out in the text in the 1977 Cumulative Supplement, but was carried in a note. The amended subdivision (9) is therefore set out in this 1978 Interim Supplement.

As the rest of the section was not changed by the amendment, only the introductory language and subdivision (9) are set out.

ARTICLE 6.*Administration and Review.***§ 78A-46. Investigations and subpoenas.**

(d) Repealed by Session Laws 1977, c. 610, s. 2, effective April 1, 1978. (1925, c. 190, s. 16; 1927, c. 149, s. 16; 1973, c. 1380; 1977, c. 610, s. 2.)

Editor's Note. — The 1977 amendment, effective April 1, 1978, repealed subsection (d), which related to testifying or producing of documents or records by persons claiming their privilege against self-incrimination.

Because of the postponed effective date of the

1977 amendment, the amendment was not given effect in the text in the 1977 Cumulative Supplement, but was carried in a note. The repeal of subsection (d) is therefore shown in the text in this 1978 Interim Supplement.

As the rest of the section was not changed by

the amendment, it is not set out.

§ 78A-48. Judicial review of orders. — (a) Any person aggrieved by a final order of the Administrator may obtain a review of the order in the superior court of any county by filing in court, within 60 days after the entry of the order, a written petition praying that the order be modified or set aside in whole or in part. A copy of the petition shall be forthwith served upon the Administrator, and thereupon the Administrator shall certify and file in court a copy of the filing and evidence upon which the order was entered. When these have been filed, the court has exclusive jurisdiction to affirm, modify, enforce, or set aside the order, in whole or in part. The findings of the Administrator as to the facts, if supported by competent, material and substantial evidence, are conclusive. If either party applies to the court for leave to adduce additional material evidence, and shows to the satisfaction of the court that there were reasonable grounds for failure to adduce the evidence in the hearing before the Administrator, the court may order the additional evidence to be taken before the Administrator and to be adduced upon the hearing in such manner and upon such conditions as the court considers proper. The Administrator may modify his findings and order by reason of the additional evidence together with any modified or new findings or order. The judgment of the court is final, subject to review by the Court of Appeals.

(b) The commencement of proceedings under subsection (a) does not, unless specifically ordered by the court, operate as a stay of the Administrator's order. (1925, c. 190, s. 18; 1927, c. 149, s. 18; 1973, c. 1380; 1977, c. 610, s. 3.)

Editor's Note. — The 1977 amendment effective April 1, 1978, substituted "any county" for "Wake County" in the first sentence of subsection (a).

1977 amendment, this section as amended was not set out in the text in the 1977 Cumulative Supplement, but was carried in a note. The amended section is therefore set out in this 1978 Interim Supplement.

Because of the postponed effective date of the

ARTICLE 7.

Civil Liability and Criminal Penalties.

§ 78A-56. Civil liabilities.

Editor's Note.— For survey of 1974 case law on securities fraud, see 53 N.C.L. Rev. 1104 (1975).

Chapter 84. Attorneys-at-Law.

ARTICLE 3.

Arguments.

§ 84-14. Court's control of argument.

Editor's Note.—

For survey of 1976 case law on criminal procedure, see 55 N.C.L. Rev. 989 (1977).

Discretion of Court. —

The trial judge is allowed discretion in controlling the arguments before the jury and he may restrict comment on facts not material to the case. *State v. Moore*, 34 N.C. App. 141, 237 S.E.2d 339 (1977).

Right to Inform Jury of Punishment. — This section, as interpreted by the Supreme Court, gives a defendant the right to inform the jury of the punishment that may be imposed upon conviction of the crime for which he is being tried. *State v. Walters*, 33 N.C. App. 521, 235 S.E.2d 906 (1977).

Statements in the defense counsel's jury argument which informed the jury of the consequences of a conviction and stated that, in light of those consequences, the jury should give the matter close attention and its most serious consideration were in all respects proper. *State v. Wilson*, 293 N.C. 47, 235 S.E.2d 219 (1977).

This section secures to counsel the right to inform the jury of the punishment prescribed for the offense for which defendant is being tried. Counsel may exercise this right by reading the punishment provisions of the statute to the jury. *State v. Walters*, 294 N.C. 311, 240 S.E.2d 628 (1978).

A defendant deprived of the right to inform the jury of the punishment that might be imposed upon conviction of the crime for which he was being tried was entitled to a new trial. *State v. Walters*, 33 N.C. App. 521, 235 S.E.2d 906 (1977).

But Not to Attack Validity of Punishment.

— Counsel may not argue the question of punishment in the sense of attacking the validity, constitutionality, or propriety of the prescribed punishment. Nor may counsel argue to the jury that the law ought to be otherwise, that the punishment provided thereby is too severe and, therefore, the jury should find the defendant not guilty of the offense charged but should find him guilty of a lesser offense or acquit him entirely. *State v. Walters*, 294 N.C. 311, 240 S.E.2d 628 (1978).

Or Its Severity. — Where the defense counsel implied in his jury argument that identification of the defendant was based on a fleeting view and that, while such a view may be sufficient to convict in some situations, it was inadequate to convict in the immediate case because the punishment was so severe, thus asking the jury to consider the punishment as part of its substantive deliberations, the trial judge correctly excluded that portion of defendant's jury argument. *State v. Wilson*, 293 N.C. 47, 235 S.E.2d 219 (1977).

Comment Relating to Dismissed Charge Is Not Relevant. — Where the case before the jury at the time of counsel's argument consisted of two assault indictments, and a murder charge had been dismissed, comment relating to a possible sentence under that charge was neither relevant nor material to the remaining assault charges before the jury and was not within the protection of this section. *State v. Moore*, 34 N.C. App. 141, 237 S.E.2d 339 (1977).

ARTICLE 4.

North Carolina State Bar.

§ 84-15. Creation of North Carolina State Bar as an agency of the State.

Cited in *North Carolina State Bar v. Hall*, 293 N.C. 539, 238 S.E.2d 521 (1977).

§ 84-23.1. Prepaid legal services.

Editor's Note. —

For article, "The Advent of Prepaid Legal

Services in North Carolina," see 13 Wake Forest L. Rev. 271 (1977).

§ 84-28. Discipline and disbarment.

Disbarment for Crime — Entry of Judgment of Conviction on Plea of Nolo Contendere. — Defendant's plea of nolo contendere in the Federal District Court to a charge of receiving and possessing chattels valued at less than \$100 knowing them to have been stolen or embezzled does not entitle the State Bar to summary

judgment authorizing disciplinary action against the defendant. *North Carolina State Bar v. Hall*, 293 N.C. 539, 238 S.E.2d 521 (1977), reversing *North Carolina State Bar v. Hall*, 31 N.C. App. 166, 229 S.E.2d 39 (1976), noted in the 1977 Supplement.

Chapter 85B.

Auctions and Auctioneers.

Sec.

85B-6. Fees; local governments not to charge fees or require licenses.

§ 85B-6. Fees; local governments not to charge fees or require licenses. —

The Commission shall collect and remit to the State Treasurer fees in an amount not to exceed the following: fifty dollars (\$50.00) for application for apprentice auctioneer license; twenty-five dollars (\$25.00) for apprentice auctioneer license for one year; twenty-five dollars (\$25.00) for application for auctioneer license and for examination; one hundred dollars (\$100.00) for auctioneer license for one year; seventy-five dollars (\$75.00) for designation as licensed auctioneer business.

No local government or agency of local government may charge any auctioneer fees or require any auctioneer licenses in addition to those set out in this Chapter. (1973, c. 552, s. 6; c. 1195, s. 3; 1975, c. 648, s. 5; 1977, 2nd Sess. c. 1219, s. 43.7.)

Editor's Note. —

The 1977, 2nd Sess., amendment, effective July 1, 1978, substituted "fees in an amount not to exceed the following" for "the following fees"

near the beginning of the first paragraph.

Session Laws 1977, 2nd Sess., c. 1219, s. 57 contains a severability clause.

Chapter 87.**Contractors.****ARTICLE 1.***General Contractors.***§ 87-1. "General contractor" defined; exemptions.**

Cited in *Hudspeth v. Bunzey*, 35 N.C. App. 231, 241 S.E.2d 119 (1978).

Chapter 88.**Cosmetic Art.****§ 88-12. Qualifications for registered cosmetologist.**

Cited in *Duggins v. North Carolina State Bd. of Cert. Pub. Accountant Exmrs.*, 294 N.C. 120, 240 S.E.2d 406 (1978).

Chapter 89C.
Engineering and Land Surveying.

§ 89C-1. Short title.

Constitutionality of Former Chapter 89. — See State v. Covington, 34 N.C. App. 457, 238 S.E.2d 794 (1977).

Chapter Not Admission that Former Guidelines Inadequate. — This chapter, which

redefines “the practice of engineering,” cannot be considered an admission by the legislature that the former statute set forth inadequate guidelines. State v. Covington, 34 N.C. App. 457, 238 S.E.2d 794 (1977).

Chapter 90.**Medicine and Allied Occupations.****Article 1.****Practice of Medicine.**

Sec.

90-18.1. Limitations on physician assistants.

90-18.2. Limitations on nurse practitioners.

Article 1C.**Physicians and Hospital Reports.**

90-21.21. Counties to which Article applicable.

Article 5.**North Carolina Controlled Substances Act.**

Sec.

90-96. Conditional discharge and expunction of records for first offense.

Article 23.**Right to Natural Death; Brain Death.**

90-321. Right to a natural death.

ARTICLE 1.*Practice of Medicine.***§ 90-2. Board of Examiners.**

The board is not a "person" within the meaning of 42 U.S.C. § 1983 and cannot be subject to a suit for damages. *Hoke v. Board of Medical Exmrs.*, 445 F. Supp. 1313 (W.D.N.C. 1978).

A suit against the board directly under the Fourteenth Amendment is barred by the Eleventh Amendment. *Hoke v. Board of Medical Exmrs.*, 445 F. Supp. 1313 (W.D.N.C. 1978).

§ 90-14. Revocation, suspension, annulment or denial of license.

Stated in *Hoke v. Board of Medical Exmrs.*, 445 F. Supp. 1313 (W.D.N.C. 1978).

§ 90-14.2. Hearing before revocation or suspension of a license.

Cited in *Hoke v. Board of Medical Exmrs.*, 445 F. Supp. 1313 (W.D.N.C. 1978).

§ 90-16. Board to keep record; publication of names of licentiates; transcript as evidence; receipt of evidence concerning treatment of patient who has not consented to public disclosure.

Stated in *Hoke v. Board of Medical Exmrs.*, 445 F. Supp. 1313 (W.D.N.C. 1978).

§ 90-18.1. Limitations on physician assistants. — (a) Any person who is approved under the provisions of G.S. 90-18 (13) to perform medical acts, tasks or functions as an assistant to a physician may use the title "physician assistant." Any other person who uses the title in any form or holds out to be a physician assistant or to be so approved, shall be deemed to be in violation of this Article.

(b) Physician assistants are authorized to write prescriptions for drugs under the following conditions:

- (1) The Board of Medical Examiners has adopted regulations governing the approval of individual physician assistants to write prescriptions with such limitations as the board may determine to be in the best interest of patient health and safety;

- (2) The physician assistant has current approval from the board;
 - (3) The Board of Medical Examiners has assigned an identification number to the physician assistant which is shown on the written prescription; and
 - (4) The supervising physician has provided to the physician assistant written instructions about indications and contraindications for prescribing drugs and a written policy for periodic review by the physician of the drugs prescribed.
- (c) Physician assistants are authorized to compound and dispense drugs under the following conditions:
- (1) The function is performed under the supervision of a licensed pharmacist; and
 - (2) Rules and regulations of the North Carolina Board of Pharmacy governing this function are complied with.
- (d) Physician assistants are authorized to order medications, tests and treatments in hospitals, clinics, nursing homes and other health facilities under the following conditions:
- (1) The Board of Medical Examiners has adopted regulations governing the approval of individual physician assistants to order medications, tests and treatments with such limitations as the board may determine to be in the best interest of patient health and safety;
 - (2) The physician assistant has current approval from the board;
 - (3) The supervising physician has provided to the physician assistant written instructions about ordering medications, tests and treatments, and when appropriate, specific oral or written instructions for an individual patient, with provision for review by the physician of the order within a reasonable time, as determined by the Board, after the medication, test or treatment is ordered; and
 - (4) The hospital or other health facility has adopted a written policy, approved by the medical staff after consultation with the nursing administration, about ordering medications, tests and treatments, including procedures for verification of the physician assistants' orders by nurses and other facility employees and such other procedures as are in the interest of patient health and safety.
- (e) Any prescription written by a physician assistant or order given by a physician assistant for medications, tests or treatments shall be deemed to have been authorized by the physician approved by the board as the supervisor of the physician assistant and such supervising physician shall be responsible for authorizing such prescription or order.
- (f) Any registered nurse or licensed practical nurse who receives an order from a physician assistant for medications, tests or treatments is authorized to perform that order in the same manner as if it were received from a licensed physician. (1975, c. 627; 1977, c. 904, s. 1; 1977, 2nd Sess., c. 1194, s. 1.)

Editor's Note. —

The 1977, 2nd Sess., amendment, effective July 1, 1978, rewrote this section, which

formerly dealt with the prescription, compounding and dispensing of drugs by physician's assistants and registered nurses.

§ 90-18.2. Limitations on nurse practitioners. — (a) Any nurse approved under the provisions of G.S. 90-18(14) to perform medical acts, tasks or functions may use the title "nurse practitioner." Any other person who uses the title in any form or holds out to be a nurse practitioner or to be so approved, shall be deemed to be in violation of this Article.

(b) Nurse practitioners are authorized to write prescriptions for drugs under the following conditions:

- (1) The Board of Medical Examiners and Board of Nursing have adopted

regulations developed by a joint subcommittee governing the approval of individual nurse practitioners to write prescriptions with such limitations as the boards may determine to be in the best interest of patient health and safety;

- (2) The nurse practitioner has current approval from the boards;
- (3) The Board of Medical Examiners has assigned an identification number to the nurse practitioner which is shown on the written prescription; and
- (4) The supervising physician has provided to the nurse practitioner written instructions about indications and contraindications for prescribing drugs and a written policy for periodic review by the physician of the drugs prescribed.

(c) Nurse practitioners are authorized to compound and dispense drugs under the following conditions:

- (1) The function is performed under the supervision of a licensed pharmacist; and
- (2) Rules and regulations of the North Carolina Board of Pharmacy governing this function are complied with.

(d) Nurse practitioners are authorized to order medications, tests and treatments in hospitals, clinics, nursing homes and other health facilities under the following conditions:

- (1) The Board of Medical Examiners and Board of Nursing have adopted regulations developed by a joint subcommittee governing the approval of individual nurse practitioners to order medications, tests and treatments with such limitations as the boards may determine to be in the best interest of patient health and safety;
- (2) The nurse practitioner has current approval from the boards;
- (3) The supervising physician has provided to the nurse practitioner written instructions about ordering medications, tests and treatments, and when appropriate, specific oral or written instructions for an individual patient, with provision for review by the physician of the order within a reasonable time, as determined by the board, after the medication, test or treatment is ordered; and
- (4) The hospital or other health facility has adopted a written policy, approved by the medical staff after consultation with the nursing administration, about ordering medications, tests and treatments, including procedures for verification of the nurse practitioners' orders by nurses and other facility employees and such other procedures as are in the interest of patient health and safety.

(e) Any prescription written by a nurse practitioner or order given by a nurse practitioner for medications, tests or treatments shall be deemed to have been authorized by the physician approved by the boards as the supervisor of the nurse practitioner and such supervising physician shall be responsible for authorizing such prescription or order.

(f) Any registered nurse or licensed practical nurse who receives an order from a nurse practitioner for medications, tests or treatments is authorized to perform that order in the same manner as if it were received from a licensed physician. (1977, 2nd Sess., c. 1194, s. 2.)

Editor's Note. — Session Laws 1977, 2nd Sess., c. 1194, s. 3, makes the act effective July 1, 1978.

ARTICLE 1A.

*Treatment of Minors.***§ 90-21.1. When physician may treat minor without consent of parent, guardian or person in loco parentis.****Protection Extends to Social Workers and Psychologists Working under Physicians. —**

Under the terms of this Article, the legal protection which the Article affords to a physician treating a minor without parental consent extends to social workers and psychologists who are working under the direction and supervision of such physician but does not extend to social workers and psychologists who are not working under the direction and supervision of a physician. Opinion of Attorney General to Mr. Ed McClearsen, Staff Attorney, Mental Health Study Commission, 47 N.C.A.G. 83 (1977).

Delegation of Responsibility to Nurse Practitioner or Physician's Assistant. —

A physician associated with a publicly supported family planning clinic can delegate responsibility for medically related contraceptive services to a nurse practitioner or physician's assistant whom he supervises and who functions under his standing orders, if these functions are specifically approved for the individual nurse practitioner or physician's assistant by the board of medical examiners. Opinion of Attorney General to Margie Rose, M.P.H. Branch Head, Family Planning Branch, Division of Health Services, 47 N.C.A.G. 80 (1977).

§ 90-21.4. Responsibility, liability and immunity of physicians.

The provisions of this section provide immunity from civil or criminal liability to a nurse practitioner or physician's assistant for non-negligent acts performed under the physician's supervision and while functioning under the physician's standing orders if the

delegation of responsibility is proper. Opinion of Attorney General to Margie Rose, M.P.H. Branch Head, Family Planning Branch, Division of Health Services, 47 N.C.A.G. 80 (1977).

ARTICLE 1B.

*Medical Malpractice Actions.***§ 90-21.12. Standard of health care.**

Quoted in *Thompson v. Lockert*, 34 N.C. App. 1, 237 S.E.2d 259 (1977).

ARTICLE 1C.

Physicians and Hospital Reports.

§ 90-21.21. Counties to which Article applicable. — This Article shall apply only to Alamance, Anson, Avery, Beaufort, Buncombe, Craven, Davidson, Davie, Durham, Forsyth, Gaston, Guilford, Hertford, Hyde, Iredell, Martin, Mecklenburg, Montgomery, New Hanover, Onslow, Polk, Randolph, Robeson, Rockingham, Rowan, Stanly, Stokes, Surry, Union, Wake and Wayne Counties. (1971, cc. 4, 594; 1977, c. 31; c. 843, s. 1; 1977, 2nd Sess., c. 1199.)

Editor's Note. —

Session Laws 1977, 2nd Sess., c. 1199, s. 1, provides: "Section 2 of 1977 Session Laws, Chapter 843 is amended by inserting the word 'Anson' after the word 'Alamance', and before the word 'Avery'." Section 2 of Session Laws 1977, c. 843, in fact amended the section codified

herein as § 90-21.20. Section 1 of Session Laws 1977, c. 843, amended § 1 of Session Laws 1977, c. 31, which section rewrote § 2 of Session Laws 1971, codified herein as the above § 90-21.21. In order to give effect to the 1977, 2nd Sess., act according to its obvious intent, "Anson" has been inserted in the section as set out above.

ARTICLE 4.

Pharmacy.

Part 1. Practice of Pharmacy.

§ 90-61. Application and examination for license; prerequisites.

Cited in *Duggins v. North Carolina State Bd. of Cert. Pub. Accountant Exmrs.*, 294 N.C. 120, 240 S.E.2d 406 (1978).

§ 90-65. Denial, suspension, revocation or refusal to renew pharmacist's license or drugstore permit.

Cited in *White v. North Carolina Bd. of Pharmacy*, 35 N.C. App. 554, 241 S.E.2d 730 (1978).

ARTICLE 5.

North Carolina Controlled Substances Act.

§ 90-86. Title of Article.

Editor's Note. — For survey of 1976 case law on criminal law, see 55 N.C.L. Rev. 976 (1977).

§ 90-87. Definitions.

Evidence Sufficient to Show Manufacture of Marijuana. — Evidence was sufficient to withstand a motion for judgment as of nonsuit on a charge of manufacture of marijuana where stripped stalks of marijuana were found growing behind a television antenna connected to the defendant's residence and marijuana

plants were found growing in flower pots on a table in the defendant's front yard 32 feet from his residence. *State v. Wiggins*, 33 N.C. App. 291, 235 S.E.2d 265 (1977).

Stated in *State v. Bell*, 33 N.C. App. 607, 235 S.E.2d 886 (1977); *State v. Shufford*, 34 N.C. App. 115, 237 S.E.2d 481 (1977).

§ 90-94. Schedule VI controlled substances.

Editor's Note. —

For survey of 1976 case law on criminal law, see 55 N.C.L. Rev. 976 (1977).

Stated in *State v. Shufford*, 34 N.C. App. 115, 237 S.E.2d 481 (1977).

§ 90-95. Violations; penalties.

Editor's Note. —

For note on the punishment of physicians under the Controlled Substances Act, see 56 N.C.L. Rev. 154 (1978).

Constructive Possession Defined. —

Constructive possession of marijuana exists when the accused is without actual personal dominion over the material, but has the intent and capability to maintain control and dominion over it. *State v. Wiggins*, 33 N.C. App. 291, 235 S.E.2d 265 (1977).

This section makes it unlawful to possess

any amount of heroin regardless of value. *State v. Bell*, 33 N.C. App. 607, 235 S.E.2d 886 (1977).

Establishing Possession. —

In accord with 3rd paragraph in original. See *State v. Wiggins*, 33 N.C. App. 291, 235 S.E.2d 265 (1977); *State v. Blackburn*, 34 N.C. App. 683, 239 S.E.2d 626 (1977).

In accord with 6th paragraph in original. See *State v. Wiggins*, 33 N.C. App. 291, 235 S.E.2d 265 (1977).

Evidence tending to show that defendant had possession and control of and claimed ownership

to the automobile in which drugs were located was sufficient to show that defendant had constructive possession of the drugs in question. *State v. Leonard*, 34 N.C. App. 131, 237 S.E.2d 347 (1977).

Marijuana located in flower pots 32 feet in front of defendant's trailer and beside defendant's television antenna was within such close proximity to defendant's residence as to raise the inference that defendant had at least constructive possession of it. *State v. Wiggins*, 33 N.C. App. 291, 235 S.E.2d 265 (1977).

Mere proximity to persons or locations with drugs, etc. —

Where there was no evidence concerning whether the flower bed and cornfield in which marijuana was located were on defendant's property or otherwise under his control, nor any evidence linking defendant to the marijuana other than the fact that it was growing near his trailer, admission of the marijuana into evidence was error in a prosecution for manufacture and possession of marijuana with intent to sell and deliver. *State v. Wiggins*, 33 N.C. App. 291, 235 S.E.2d 265 (1977).

Establishing Intent to Distribute. —

Possession of 215.5 grams of marijuana, without some additional evidence, is not sufficient to raise an inference that the marijuana was for the purpose of distribution, and therefore is not sufficient to withstand a motion for judgment as of nonsuit on a charge of possession with intent to sell and distribute. *State v. Wiggins*, 33 N.C. App. 291, 235 S.E.2d 265 (1977).

Establishing Manufacture. —

Evidence was sufficient to withstand a motion for judgment as of nonsuit on a charge of manufacture of marijuana where stripped stalks of marijuana were found growing behind a television antenna connected to the defendant's residence and marijuana plants were found growing in flower pots on a table in the defendant's front yard 32 feet from his

residence. *State v. Wiggins*, 33 N.C. App. 291, 235 S.E.2d 265 (1977).

Possession with intent to sell and sale are distinct offenses, and the former is not a lesser included offense of the latter. *State v. Saunders*, 35 N.C. App. 359, 241 S.E.2d 351 (1978).

"Close juxtaposition" of defendants to marijuana as sufficient to withstand nonsuit on charges of manufacture and possession. See *State v. Shufford*, 34 N.C. App. 115, 237 S.E.2d 481, petition for review denied, 293 N.C. 592 (1977).

Evidence Sufficient to Withstand Motion for Nonsuit on Charges of Manufacture and Possession. — Evidence that (1) officers heard running through the house immediately after announcing the presence of the police and requesting entry; (2) defendants were found in the downstairs bedroom with the packaged marijuana next to the kitchen where the manufacturing paraphernalia was assembled; and (3) two blenders were in operation and manufacturing appear to be in progress, was sufficient to withstand a motion for nonsuit on charges of manufacture and possession of marijuana. *State v. Shufford*, 34 N.C. App. 115, 237 S.E.2d 481, petition for review denied, 293 N.C. 592 (1977).

Practice of Arresting for Possession of Marijuana But Not Alcoholic Beverages. —

The practice of arresting or causing to be arrested persons present at the Greensboro Coliseum Complex who have marijuana in their possession and not arresting or causing to be arrested persons found at the Greensboro Coliseum Complex who have alcoholic beverages in their possession is not unconstitutional and does not violate either the due process or equal protection clauses of the Fourteenth Amendment to the United States Constitution. *Wheaton v. Hagan*, 435 F. Supp. 1134 (M.D.N.C. 1977).

Cited in *State v. Beddard*, 35 N.C. App. 212, 241 S.E.2d 83 (1978).

§ 90-96. Conditional discharge and expunction of records for first offense.

— (a) Whenever any person who has not previously been convicted of any offense under this Article, or under any statute of the United States, or any state relating to controlled substances included in any schedule of this Article pleads guilty to or is found guilty of a misdemeanor under this Article by possessing a controlled substance included within Schedules III through VI of this Article, the court may without entering a judgment of guilt and with the consent of such person, defer further proceedings and place him on probation upon such reasonable terms and conditions as it may require. Notwithstanding the provisions of G.S. 15A-1342(c) or any other statute or law, probation may be imposed under this section for an offense under this Article for which the prescribed punishment includes only a fine. Upon violation of a term or condition, the court may enter an adjudication of guilt and proceed as otherwise provided. Upon fulfillment of the terms and conditions, the court shall discharge such person and dismiss the proceedings against him. Discharge and dismissal under this section shall be without court adjudication of guilt and shall not be deemed

a conviction for purposes of this section or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime including the additional penalties imposed for second or subsequent convictions of this Article. Discharge and dismissal under this section may occur only once with respect to any person. Disposition of a case under this section at the district court division of the General Court of Justice shall be final for the purpose of appeal.

(1977, 2nd Sess., c. 1147, s. 11B.)

Editor's Note. —

The 1977, 2nd Sess., amendment added the second sentence of subsection (a). Session Laws 1977, 2nd Sess., c. 1147, s. 11B, provides: "The provisions of the preceding sentence [the

sentence added to subsection (a) of this section by the amendment] shall apply to all offenses committed on or after July 1, 1977."

As the rest of the section was not changed by the amendment, only subsection (a) is set out.

§ 90-104. Records of registrants or practitioners.

Quoted in *White v. North Carolina Bd. of Pharmacy*, 35 N.C. App. 554, 241 S.E.2d 730 (1978).

§ 90-108. Prohibited acts; penalties.

Editor's Note. —

For note on the punishment of physicians

under the Controlled Substances Act, see 56 N.C.L. Rev. 154 (1978).

ARTICLE 13A.

Practice of Funeral Service.

§ 90-210.25. Licensing.

Cited in *Duggins v. North Carolina State Bd. of Cert. Pub. Accountant Exmrs.*, 294 N.C. 120, 240 S.E.2d 406 (1978).

ARTICLE 15A.

Uniform Anatomical Gift Act.

§ 90-220.1. Definitions.

Editor's Note. —

For note on determining the time of death of

the heart transplant donor, see 51 N.C.L. Rev. 172 (1972).

§ 90-220.7. Rights and duties at death.

Editor's Note. —

For note on determining the time of death of

the heart transplant donor, see 51 N.C.L. Rev. 172 (1972).

ARTICLE 18A.

*Practicing Psychologists.***§ 90-270.11. Licensing and examination.**

Cited in *Duggins v. North Carolina State Bd. of Cert. Pub. Accountant Exmrs.*, 294 N.C. 120, 240 S.E.2d 406 (1978).

ARTICLE 23.

*Right to Natural Death; Brain Death.***§ 90-321. Right to a natural death.**

(b) If a person has declared, in accordance with subsection (c) below, a desire that his life not be prolonged by extraordinary means; and the declaration has not been revoked in accordance with subsection (e); and

(1) It is determined by the attending physician that the declarant's present condition is

a. Terminal; and

b. Incurable; and

(2) There is confirmation of the declarant's present condition as set out above in subdivision (b)(1) by a physician other than the attending physician;

then extraordinary means may be withheld or discontinued upon the direction and under the supervision of the attending physician.

Editor's Note. —

Subsection (b) of this section is set out in order to correct a typographical error in subdivision

(b)(2) in the 1977 Cumulative Supplement.

As the rest of the section was not affected, only subsection (b) is set out.

Chapter 93.**Public Accountants.****§ 93-1. Definitions; practice of law.**

Quoted in *Duggins v. North Carolina State Bd. of Cert. Pub. Accountant Exmrs.*, 294 N.C. 120, 240 S.E.2d 406 (1978).

§ 93-12. Board of Certified Public Accountant Examiners.

Subdivision (5) does not violate the equal protection clauses of the federal and State Constitutions. *Duggins v. North Carolina State Bd. of Cert. Pub. Accountant Exmrs.*, 294 N.C. 120, 240 S.E.2d 406 (1978).

The phrase "in public practice" as used in that portion of subdivision (5), which reads "'two years' experience on the field staff of a certified public accountant or a North Carolina public accountant 'in public practice'" is equivalent to the phrase "public practice of accountancy" defined in § 93-1. *Duggins v. North Carolina State Bd. of Cert. Pub. Accountant Exmrs.*, 294 N.C. 120, 240 S.E.2d 406 (1978).

The requirement in subdivision (5) that an applicant for certification have two years' experience under the tutelage of an accountant engaged in the public practice of accountancy is rationally related to the legislative purpose of ensuring that only an applicant qualified and

prepared to enter the public practice by himself be certified. *Duggins v. North Carolina State Bd. of Cert. Pub. Accountant Exmrs.*, 294 N.C. 120, 240 S.E.2d 406 (1978).

To achieve the statutory purpose that only competent and experienced applicants be certified, subdivision (5) must be interpreted as requiring that an applicant's experience not only be received under the supervision of an accountant but that it be in the public field of accountancy. *Duggins v. North Carolina State Bd. of Cert. Pub. Accountant Exmrs.*, 294 N.C. 120, 240 S.E.2d 406 (1978).

Subdivision (5) requires that an applicant for certification who relies upon two years' experience on the "field staff" of a Certified Public Accountant must have worked under a C.P.A. in public practice. *Duggins v. North Carolina State Bd. of Cert. Pub. Accountant Exmrs.*, 294 N.C. 120, 240 S.E.2d 406 (1978).

Chapter 93A.

Real Estate Brokers and Salesmen.

§ 93A-2. Definitions and exceptions.

Editor's Note. —

For survey of 1976 case law on commercial law, see 55 N.C.L. Rev. 943 (1977).

For a note on the use of state constitutional

law to void occupational licensing statutes which unreasonably restrict freedom of occupational choice, see 13 Wake Forest L. Rev. 507 (1977).

§ 93A-4. Applications for licenses; fees; qualifications; examinations; bond; privilege licenses; renewal or reinstatement of license; power to enforce provisions.

Editor's Note. —

For a note on the use of state constitutional law to void occupational licensing statutes which

unreasonably restrict freedom of occupational choice, see 13 Wake Forest L. Rev. 507 (1977).

Chapter 95.**Department of Labor and Labor Regulations.****ARTICLE 10.***Declaration of Policy as to Labor Organizations.***§ 95-81. Nonmembership as condition of employment prohibited.****Editor's Note. —**

For note on federal preemption of state

damage remedies for discharge, see 53 N.C.L. Rev. 571 (1974).

§ 95-83. Recovery of damages by persons denied employment.**Editor's Note. —** For note on federal preemption of state damage remedies for discharge, see 53 N.C.L. Rev. 571 (1974).**ARTICLE 12.***Public Employees Prohibited from Becoming Members of Trade Unions or Labor Unions.***§ 95-98. Contracts between units of government and labor unions, trade unions or labor organizations concerning public employees declared to be illegal.****Regulations Relating to Prisoners' Labor Union. —** Regulations promulgated by the Department of Correction prohibiting prisoners from soliciting other inmates to join a prisoners' labor union and barring union meetings and bulk mailings concerning the union from outsidesources were not in violation of the First Amendment rights of free speech, association and assembly, or of equal protection under the Fourteenth Amendment. *Jones v. North Carolina Prisoners' Labor Union, Inc.*, U.S. , 97 S. Ct. 2532, L.Ed.2d (1977).**ARTICLE 16.***Occupational Safety and Health Act of North Carolina.***§ 95-126. Short title and legislative purpose.****Editor's Note. —**

For survey of 1974 case law on proceedings

under the Occupational Safety and Health Act, see 53 N.C.L. Rev. 1005 (1975).

Chapter 96.

Employment Security.

ARTICLE 1.

Employment Security Commission.

§ 96-2. Declaration of State public policy.

Editor's Note. — For survey of 1976 case law dealing with administrative law, see 55 N.C.L. Rev. 898 (1977).

ARTICLE 2.

Unemployment Insurance Division.

§ 96-13. Benefit eligibility conditions.

Editor's Note. — For survey of 1972 case law on the applicability of the "available for work"

requirement to voluntary retirees, see 51 N.C.L. Rev. 1205 (1973).

§ 96-14. Disqualification for benefits.

Editor's Note. — For survey of 1972 case law on the applicability of the "available for work" requirement to voluntary retirees, see 51 N.C.L. Rev. 1205 (1973).

For survey of 1976 case law dealing with administrative law, see 55 N.C.L. Rev. 898 (1977).

Chapter 97.

Workmen's Compensation Act.

ARTICLE 1.

Workmen's Compensation Act.

§ 97-2. Definitions.

I. IN GENERAL.

Editor's Note. —

For survey of 1972 case law on the "arising out of" requirement, see 51 N.C.L. Rev. 1215 (1973).

For survey of 1976 case law on workman's compensation, see 55 N.C.L. Rev. 1116 (1977).

IV. INJURY BY ACCIDENT ARISING OUT OF AND IN THE COURSE OF THE EMPLOYMENT.

B. Accident.

Accident and injury are considered separate. —

The mere fact of injury does not of itself establish the fact of accident. *Key v. Wagner Woodcraft, Inc.*, 33 N.C. App. 310, 235 S.E.2d 254 (1977).

To be compensable under this Chapter, an injury must result from an accident which is to be considered as a separate event preceding and causing the injury. *Key v. Wagner Woodcraft, Inc.*, 33 N.C. App. 310, 235 S.E.2d 254 (1977).

An "accident" is not established by the mere fact of injury but is to be considered as a separate event preceding and causing the injury. *Searsey v. Perry M. Alexander Constr. Co.*, 35 N.C. App. 78, 239 S.E.2d 847 (1978).

"Accident" Defined. —

In accord with 1st paragraph in original. See *Searsey v. Perry M. Alexander Constr. Co.*, 35 N.C. App. 78, 239 S.E.2d 847 (1978).

In accord with 2nd paragraph in original. See *Kennedy v. Martin Marietta Chems.*, 34 N.C. App. 177, 237 S.E.2d 542 (1977).

Injury by accident is an injury produced by a fortuitous cause. *Kennedy v. Martin Marietta Chems.*, 34 N.C. App. 177, 237 S.E.2d 542 (1977).

Accident involves the interruption, etc. —

In accord with 1st paragraph in original. See *Key v. Wagner Woodcraft, Inc.*, 33 N.C. App. 310, 235 S.E.2d 254 (1977).

In accord with 4th paragraph in original. See *Smith v. Burlington Indus., Inc.*, 35 N.C. App. 105, 239 S.E.2d 845 (1978).

No matter how great the injury, if it is caused by an event that involves both an employee's normal work routine and normal working conditions it will not be considered to have been caused by accident. *Searsey v. Perry M. Alexander Constr. Co.*, 35 N.C. App. 78, 239 S.E.2d 847 (1978).

The evidence was sufficient to support the

commission's conclusion that the ruptured disc suffered by the claimant was an injury by accident where the evidence showed that the claimant was not carrying out his usual and customary duties, and that the circumstances involved an interruption of the work routine and the introduction thereby of unusual conditions likely to result in unexpected consequences. *Key v. Wagner Woodcraft, Inc.*, 33 N.C. App. 310, 235 S.E.2d 254 (1977).

Intentional Injurious Acts Excluded. — The qualifications that an accident cannot be expected or designed operate narrowly to exclude intentional injurious acts. *Searsey v. Perry M. Alexander Constr. Co.*, 35 N.C. App. 78, 239 S.E.2d 847 (1978).

Rupture, etc. —

In accord with 1st paragraph in original. See *Key v. Wagner Woodcraft, Inc.*, 33 N.C. App. 310, 235 S.E.2d 254 (1977).

C. Arising Out of and in the Course of Employment.

"Out of" and "in the Course of" Distinguished. —

The phrases "arising out of" and "in the course of" are not synonymous and both must be fulfilled in order for claimants to recover. *Martin v. Bonclarken Ass'y*, 35 N.C. App. 489, 241 S.E.2d 848 (1978).

"In the Course of" the Employment Construed. —

Three conditions must be fulfilled in order for an accident to be in the course of employment. These three conditions are of time, place, and circumstance. "Time" includes the time during a working day including the lunch hour. "Place" includes the premises of the employer. In respect to "circumstances," compensable accidents are those sustained while the employee is doing what a man so employed may reasonably do within a time which he is employed, and at a place where he may reasonably be during that time to do that thing. *Martin v. Bonclarken Ass'y*, 35 N.C. App. 489, 241 S.E.2d 848 (1978).

"Arising Out of" Defined. —

An accident arises out of employment when it is the result of a risk or hazard incident to the employment and is not from a hazard common to the public. *Martin v. Bonclarken Ass'y*, 35 N.C. App. 489, 241 S.E.2d 848 (1978).

Even though an accident occurred on the employer's premises at a time when the employee was within the compass of his employment, this alone is insufficient to justify a finding that the injury arose out of the employment. *Strickland v. King*, 293 N.C. 731, 239 S.E.2d 243 (1977).

Rule of Causal Relation. —

In accord with 3rd paragraph in original. See *Hensley v. Caswell Action Comm., Inc.*, 35 N.C. App. 544, 241 S.E.2d 852 (1978).

2. Origin and Cause of Accident.

a. Risks Incident to the Employment Generally.

Injury Due to Peculiar Hazard of Employee's Location. —

In accord with original. See *Hensley v. Caswell Action Comm., Inc.*, 35 N.C. App. 544, 241 S.E.2d 852 (1978).

3. Time, Place and Circumstances of Accident.

b. Injuries While Going to and from Work.

(3) On Employer's Premises.

Injury on Employer's Premises May Be Compensable. —

Injuries sustained by an employee while going to or from the work place on premises owned or

controlled by the employer are generally deemed to have arisen out of and in the course of employment. *Strickland v. King*, 293 N.C. 731, 239 S.E.2d 243 (1977).

(4) Where Employer Furnishes Transportation.

Where Employer Furnishes Transportation, etc. —

Injuries received by an employee while traveling to or from his place of employment are usually not covered by the Workmen's Compensation Act unless the employer furnishes the means of transportation as an incident of the contract of employment. *Strickland v. King*, 293 N.C. 731, 239 S.E.2d 243 (1977).

V. Disability.

"Disability" Signifies Impairment of Wage-Earning Capacity. —

The injured employee's disability is determined by the impairment of his wage-earning capacity and not by the extent of his physical impairment. *Little v. Anson County Schools Food Serv.*, 33 N.C. App. 742, 236 S.E.2d 801 (1977).

Cited in *Britt v. Colony Constr. Co.*, 35 N.C. App. 23, 240 S.E.2d 479 (1978); *Perry v. Hibriten Furn. Co.*, 35 N.C. App. 518, 241 S.E.2d 697 (1978).

§ 97-9. Employer to secure payment of compensation.

Employee Cannot Maintain, etc. —

In accord with 1st paragraph in original. See

Strickland v. King, 293 N.C. 731, 239 S.E.2d 243 (1977).

§ 97-10.2. Rights under Article not affected by liability of third party; rights and remedies against third parties.

Editor's Note. —

For survey of 1976 case law on workman's compensation, see 55 N.C.L. Rev. 1116 (1977).

§ 97-12. Use of intoxicant or controlled substance; willful neglect; willful disobedience of statutory duty, safety regulation or rule.

Editor's Note. —

For survey of 1976 case law on workman's compensation, see 55 N.C.L. Rev. 1116 (1977).

§ 97-17. Settlements allowed in accordance with Article.

Editor's Note. — For survey of 1976 case law on workman's compensation, see 55 N.C.L. Rev. 1116 (1977).

§ 97-22. Notice of accident to employer.

Failure to Give Written Notice Excused. — There was competent evidence to support the commission's determination that the claimant was reasonably excused from not giving written notice and that the employer was not prejudiced thereby where the evidence indicated that on the date of the injury by accident about 10 minutes after it occurred, and during plaintiff's hospitalization, the plant manager visited plaintiff who related the details of the occurrence to him. *Key v. Wagner Woodcraft, Inc.*, 33 N.C. App. 310, 235 S.E.2d 254 (1977).

Commission's Findings Conclusive if Supported by Sufficient Evidence. — Where the evidence is sufficient to support the commission's findings that reasonable excuse for not giving the required written notice was shown, and that the employer was not prejudiced by the failure to give written notice, the findings are conclusive on appeal. *Key v. Wagner Woodcraft, Inc.*, 33 N.C. App. 310, 235 S.E.2d 254 (1977).

§ 97-24. Right to compensation barred after two years; destruction of records.

Editor's Note. —

For article, "Statutes of Limitations in the Conflict of Laws," see 52 N.C.L. Rev. 489 (1974).

§ 97-31. Schedule of injuries; rate and period of compensation.

Provisions Are Mandatory. —

This section sets out a strict and exclusive compensation scheme. *Perry v. Hibriten Furn. Co.*, 35 N.C. App. 518, 241 S.E.2d 697 (1978).

Measure of Compensation. — Though "disability" signifies an impairment of wage-earning capacity rather than a physical impairment, this signification does not establish impairment of wage-earning capacity as the measure of compensation. *Perry v. Hibriten Furn. Co.*, 35 N.C. App. 518, 241 S.E.2d 697 (1978).

"Disability" Construed. —

In accord with 2nd paragraph in 1977 Cum. Supp. See *Perry v. Hibriten Furn. Co.*, 35 N.C. App. 518, 241 S.E.2d 697 (1978).

"Healing Period" Defined. —

In accord with 1977 Cum. Supp. See *Perry v. Hibriten Furn. Co.*, 35 N.C. App. 518, 241 S.E.2d 697 (1978).

When Healing Period Terminates. —

In accord with 2nd paragraph in 1977 Cum. Supp. See *Perry v. Hibriten Furn. Co.*, 35 N.C. App. 518, 241 S.E.2d 697 (1978).

"Hand" as used in subdivision (12) refers to the fingers and thumb, the hand proper and the wrist. *Thompson v. Frank Ix & Sons*, 33 N.C. App. 350, 235 S.E.2d 250 (1977).

Applied in *Thompson v. Frank Ix & Sons*, 294 N.C. 358, 240 S.E.2d 783 (1978).

§ 97-33. Prorating in event of earlier disability or injury.

Editor's Note. —

For note discussing limitations on the

apportionment of disabilities, see 54 N.C.L. Rev. 1123 (1976).

§ 97-35. How compensation paid for two injuries; employer liable only for subsequent injury.

Editor's Note. — For note discussing limitations on the apportionment of disabilities, see 54 N.C.L. Rev. 1123 (1976).

§ 97-36. Accidents taking place outside State; employees receiving compensation from another state.

Editor's Note. —

For article, "Recognition of Foreign Judgments," see 50 N.C.L. Rev. 21 (1971).

§ 97-38. Where death results proximately from the accident; dependents; burial expenses; compensation to aliens; election by partial dependents.

Cited in *Britt v. Colony Constr. Co.*, 35 N.C. App. 23, 240 S.E.2d 479 (1978).

§ 97-39. Widow, widower, or child to be conclusively presumed to be dependent; other cases determined upon facts; division of death benefits among those wholly dependent; when division among partially dependent.

Cited in *Britt v. Colony Constr. Co.*, 35 N.C. App. 23, 240 S.E.2d 479 (1978).

§ 97-40.1. Second Injury Fund.

Editor's Note. —

For note discussing limitations on the

apportionment of disabilities, see 54 N.C.L. Rev. 1123 (1976).

§ 97-47. Change of condition; modification of award.

Editor's Note. —

For survey of 1976 case law on workman's compensation, see 55 N.C.L. Rev. 1116 (1977).

§ 97-82. Memorandum of agreement between employer and employee to be submitted to Commission on prescribed forms for approval.

Editor's Note. — For survey of 1976 case law on workman's compensation, see 55 N.C.L. Rev. 1116 (1977).

§ 97-86. Award conclusive as to facts; appeal; certified questions of law.

Scope of Review. —

In accord with 3rd paragraph in original. See *Gaines v. L.D. Swain & Son*, 33 N.C. App. 575, 235 S.E.2d 856 (1977).

Findings Required on Crucial Facts Only. — While the commission is not required to make findings as to each fact presented by the evidence, it is required to make specific findings with respect to crucial facts upon which the question of plaintiff's right to compensation depends. *Gaines v. L.D. Swain & Son*, 33 N.C. App. 575, 235 S.E.2d 856 (1977).

The findings of fact of the Industrial Commission are conclusive, etc. —

In accord with 23rd paragraph in original. See

Gaines v. L.D. Swain & Son, 33 N.C. App. 575, 235 S.E.2d 856 (1977).

The findings of fact of the Industrial Commission should tell, etc. —

In accord with 1st paragraph in original. See *Gaines v. L.D. Swain & Son*, 33 N.C. App. 575, 235 S.E.2d 856 (1977).

Remand Where Findings Insufficient. —

In accord with 2nd paragraph in original. See *Gaines v. L.D. Swain & Son*, 33 N.C. App. 575, 235 S.E.2d 856 (1977).

Applied in *Key v. Wagner Woodcraft, Inc.*, 33 N.C. App. 310, 235 S.E.2d 254 (1977).

Chapter 104B.**Hurricanes or Other Acts of Nature.****ARTICLE 3.***Protection of Sand Dunes along Outer Banks.***§ 104B-16. Regulation and enforcement powers of Environmental Management Commission.****Editor's Note. —**

For article, "Public Rights and Coastal Zone Management," see 51 N.C.L. Rev. 1 (1972).

Chapter 105.**Taxation.****SUBCHAPTER I. LEVY OF TAXES.****Article 2.****Schedule B. License Taxes.**

Sec.

105-33. Taxes under this article.

Article 4.**Schedule D. Income Tax.****Division II. Individual
Income Tax.**

105-141. "Gross income" defined.

105-159.1. Designation of tax by individual to political party.

**Division IV. Manufacturer's Income Tax
Credit.**

105-163.01. Short title.

105-163.02. Definitions.

105-163.03. Tax credit.

105-163.04. Manufacturer must keep records.

Article 5.**Schedule E. Sales and Use Tax.****Division II. Taxes Levied.****Part 1. Retail Sales Tax.**

105-164.4. Imposition of tax; retailer.

Part 4. General Provisions.

105-164.12. Freight or delivery transportation charges.

(Division III. Exemptions and Exclusions.

105-164.13. Retail sales and use tax.

Article 7.**Schedule H. Intangible Personal Property.**

105-199. Money on deposit.

**SUBCHAPTER II. LISTING, APPRAISAL,
AND ASSESSMENT OF PROPERTY
AND COLLECTION OF TAXES
ON PROPERTY.****Article 13.****Standards for Appraisal and Assessment.**

Sec.

105-283. Uniform appraisal standards.

Article 15.**Duties of Department and Property
Tax Commission as to Assessments.**

105-289.1. Department of Revenue; duties; manufacturers' inventories.

Article 18.**Reports in Aid of Listing.**

105-316.1. Tax permit required to move mobile home.

105-316.4. Issuance of permits under repossession.

105-316.5. Form of permit.

105-316.6. Penalties for violations.

SUBCHAPTER V. GASOLINE TAX.**Article 36.****Gasoline Tax.**

105-446.3. Refund of taxes paid on motor fuels used in operation of motor buses transporting fare-paying passengers in a city transit system, in operation of a taxicab transporting fare-paying passengers, and in operation of private nonprofit transportation services.

SUBCHAPTER I. LEVY OF TAXES.**ARTICLE 1.*****Schedule A. Inheritance Tax.*****§ 105-2. General provisions.****Editor's Note. —**

For comment discussing state adoption of federal taxing concepts, see 51 N.C.L. Rev. 834 (1973).

For survey on 1972 case law on inheritance tax and the Uniform Gifts to Minors Act, see 51 N.C.L. Rev. 1184 (1973).

§ 105-4. Rate of tax — Class A.**Editor's Note. —**

For comment discussing state adoption of

federal taxing concepts, see 51 N.C.L. Rev. 834 (1973).

§ 105-5. Rate of tax — Class B.

Editor's Note. — For comment discussing state adoption of federal taxing concepts, see 51 N.C.L. Rev. 834 (1973).

§ 105-6. Rate of tax — Class C.

Editor's Note. — For comment discussing state adoption of federal taxing concepts, see 51 N.C.L. Rev. 834 (1973).

§ 105-9. Deductions.**Editor's Note. —**

For comment discussing state adoption of

federal taxing concepts, see 51 N.C.L. Rev. 834 (1973).

§ 105-29. Uniform valuation.**Editor's Note. —**

For survey of 1976 case law on taxation, see 55 N.C.L. Rev. 1083 (1977).

ARTICLE 2.*Schedule B. License Taxes.***§ 105-33. Taxes under this Article.**

(e) Whenever, in any section of this Article or schedule, the tax is graduated with reference to the population of the city or town in which the business is to be conducted or the privilege exercised, the minimum tax provided in such section shall be applied to the same business or privilege when conducted or exercised outside of the municipality, unless such business is conducted or privilege exercised within one mile of the corporate limits of such municipality, in which event the same tax shall be imposed and collected as if the business conducted or the privilege exercised were inside of the corporate limits of such municipality: Provided, that with respect to taxes in this Article, assessed on a population basis, the same rates shall apply to incorporated towns and unincorporated places or towns alike, with the best estimate of population available being used as a basis for determining the tax in unincorporated places or towns. The term "places or towns" means any unincorporated community, point or collection of people having a geographical name by which it may be generally known, and is so generally designated.

Editor's Note. —

Subsection (e) of this section is set out to correct a typographical error in the proviso to the first sentence in the Replacement Volume.

As the rest of the section was not changed, only subsection (e) is set out.

ARTICLE 2B.*Schedule B-B. Soft Drink Tax.***§ 105-113.41. Short title.****Editor's Note. —**

For survey of 1976 case law on taxation, see 55 N.C.L. Rev. 1083 (1977).

§ 105-113.45. Taxation rate.

Stated in *Coca-Cola Co. v. Coble*, 293 N.C. 565, 238 S.E.2d 780 (1977).

§ 105-113.51. Affixing of crowns and stamps to containers; crowns and stamps not transferable.

Stated in *Coca-Cola Co. v. Coble*, 293 N.C. 565, 238 S.E.2d 780 (1977).

§ 105-113.56A. Alternate method of payment of tax.

Stated in *Coca-Cola Co. v. Coble*, 293 N.C. 565, 238 S.E.2d 780 (1977).

ARTICLE 4.***Schedule D. Income Tax.*****DIVISION I. CORPORATION INCOME TAX.****§ 105-130.5. Adjustments to federal taxable income in determining State net income.**

Amendment Effective January 1, 1980. — Session Laws 1977, 2nd Sess., c. 1200, s. 1, effective Jan. 1, 1980, and applicable to taxable years beginning on and after that date, will amend this section by adding to subsection (a) a new subdivision (10), to read as follows:

“(10) The amount of property taxes allowed under Division IV of this Article during the taxable year as a credit against the taxpayer's income tax.”

§ 105-130.8. Net economic loss.**Editor's Note. —**

For survey of 1976 case law on taxation, see 55 N.C.L. Rev. 1083 (1977).

Life Insurance Proceeds Constitute “Income Not Taxable” for Purposes of Comput-

ing the Net Economic Loss Deduction under this Section.—See opinion of Attorney General to Mr. Wiley A. Warren, Jr., Assistant Director, Corporate Income and Franchise Tax Division, 47 N.C.A.G. 29 (1977).

DIVISION II. INDIVIDUAL INCOME TAX.**§ 105-140. Net income defined.**

Editor's Note. — For comment discussing state adoption of federal taxing concepts, see 51 N.C.L. Rev. 834 (1973).

§ 105-141. “Gross income” defined.

(b) The words “gross income” do not include the following items, which shall be exempt from taxation under this Division, but shall be reported in such form and manner as may be prescribed by the Secretary of Revenue:

- (1) The proceeds of life insurance policies and contracts paid upon the death of the insured to beneficiaries or to the estate of the insured.
- (2) The amount received by the insured as a return of premium or premiums paid by him under life insurance endowment contracts, either during the term or at the maturity of the term mentioned in the contracts or upon surrender of the contract.
- (3) The value of property acquired by gift, bequest, devise or descent except as provided in G.S. 105-142.1 (but the income from such property shall be included in gross income).

- (4) Interest upon the obligations of the United States or its possessions, or of the State of North Carolina, or of a political subdivision thereof, or of nonprofit educational institutions organized or chartered under the laws of the State of North Carolina: Provided, interest upon the obligations of the United States shall not be excluded from gross income unless interest upon obligations of the State of North Carolina or any of its political subdivisions is excluded from income taxes imposed by the United States.
- (5) Any amounts received as compensation for personal injuries or sickness (i) through accident or health insurance, (ii) through health or accident plans financed by profit-sharing trusts or pension trusts, (iii) under workmen's compensation acts or similar acts (which have been judicially declared to provide benefits in the nature of workmen's compensation benefits, by whatever name called), and (iv) for damages (whether by suit or agreement); and any amounts received through self-funded reimbursement plans adopted by an employer for the benefit of his employees, reimbursing them for expenses incurred for their medical care or for the medical care of their spouses or their dependents; provided, that any amounts received from sources mentioned in this subdivision as reimbursement for medical care expenses incurred and claimed as a deduction in a prior year or in prior years shall be excluded only to the extent that such amounts exceed the deduction claimed under subdivision (11) of G.S. 105-147, except that nothing in this subdivision shall be construed as preventing a taxpayer from filing an amended return for a taxable year in which a medical deduction was claimed and allowed for the purpose of reducing the amount of the medical expense deduction claimed in such year by any reimbursement for such medical expenses received in a later year when a change in the prior year is not barred by the provisions of this Division.
- (6) The rental value of a home and the appurtenances thereof furnished to a minister of the gospel as a part of his compensation, or the rental allowance paid to him as a part of his compensation to the extent used by him to rent or provide a home including the appurtenances thereof; also the rental value of any homes and quarters and the appurtenances thereof furnished the officers and employees of orphanages whose duties require them to live on the premises and in buildings owned by such institutions as a part of their compensation.
- (7) The amounts received in lump sum or monthly payments of benefits under the Social Security Act.
- (8) The amounts received in lump sum or monthly payment benefits from retirement or pension systems of other states by former teachers or State employees of such states: Provided, this exclusion shall apply only to individuals receiving benefits from states which grant similar exclusions or exemptions for individual income tax purposes to retired members of the North Carolina Retirement System for Teachers and State Employees or which levy no income tax on individuals.
- (9) The gross income of an employee shall not include:
- a. The value of any meals or lodging furnished by his employer for the convenience of the employer provided, in the case of meals, the meals are furnished on the business premises of the employer, and, in the case of lodging, the employee is required to accept such lodging on the business premises of his employer as a condition of his employment; and
 - b. Amounts expended by his employer for premiums on group life, accident, health, or hospitalization insurance plans for the benefit of the employee.
- (10) The amounts received as a scholarship at an educational institution (as defined in G.S. 105-135) or as a fellowship grant, including the value of

contributed services and accommodations; and the amounts received to cover expenses for travel, research, clerical help, or equipment which are incident to such scholarship or fellowship grant to the extent that such amounts are exempt for federal income tax purposes under the provisions of section 117 of the Internal Revenue Code of 1954 as amended.

- (11) Amounts received by the estate, widow or heirs of an employee paid by or on behalf of one or more employers and paid by reason of death of any one employee to the extent of five thousand dollars (\$5,000) with respect to the death of any one employee regardless of the number of employers making such payments, except that such exclusion shall not apply to amounts with respect to which the employee possessed, immediately before his death, a nonforfeitable right to receive the amounts while living, except that even though an employee possessed a nonforfeitable right immediately before his death to receive the amounts while living, the exclusion provided in this subdivision will still apply in those cases in which the total distributions are payable within one taxable year of the distributee to such a distributee by a pension, profit-sharing, stock bonus or annuity trust qualifying under the provisions of subsection (f)(1)a of G.S. 105-161, or plan qualifying under the provisions of section 401(a) of the Internal Revenue Code of 1954 as amended.
- (12) Compensation received for active service as a member of the armed forces of the United States below the grade of commissioned officer; and so much of the compensation of a commissioned officer in such armed forces as does not exceed five hundred dollars (\$500.00), for any month during any part of which such member served in a combat zone, or was hospitalized as a result of wounds, disease, or injury incurred while serving in a combat zone, except that this subdivision shall not apply with respect to compensation received while such member was hospitalized for any month beginning more than two years after the date of the termination of combatant activities in such zone. With respect to service in the combat zone designated for purposes of the Vietnam conflict, this subdivision shall not apply with respect to compensation received while such member was hospitalized for any month beginning after January 2, 1977. For the purposes of this subdivision, the term "commissioned officer" does not include a warrant officer; the term "combat zone" means an area which the President of the United States by executive order designates as an area in which armed forces of the United States are or have been engaged in combat; service is performed in a combat zone only if performed on or after the date designated by the President by executive order as the date of the commencing of combatant activities in such zone; and the term "compensation" does not include pension and retirement pay.
- (13) The amounts received in lump sum or monthly payments of benefits from retirement and pension funds established for firemen or law-enforcement officers by or under the control of cities or counties located in North Carolina; provided, that such amounts shall be exempt from income tax only if they would have been exempt under the provisions of either G.S. 143-166 (relating to the Law-Enforcement Officers' Benefit and Retirement Fund) or G.S. 128-31 (relating to North Carolina Local Governmental Employees' Retirement Fund) if such cities or counties had elected to provide such benefits for firemen or law-enforcement officers under the provisions of such laws.
- (14) Any amount not to exceed three thousand dollars (\$3,000) received during any year under a federal employee retirement program to which the employee made contributions during his working years.
- (15) Amounts received by members of the armed forces as hostile-fire duty

pay which is authorized by Public Law 88-132 enacted by the Congress of the United States on October 2, 1963.

- (16) All disability pay received from the United States government by reason of service in either the army, navy, marine corps, nurses' corps, air corps, air force, or any of the armed services of the United States.
- (17) a. A portion of amounts contributed for the purchase of an annuity contract for an employee by an employer described in section 501(c)(3) of the Federal Internal Revenue Code which is exempt from federal income tax under section 501(a) of such Code, or for an employee who performs services for an educational institution (as defined in G.S. 105-135(3)) by an employer which is a state, a political subdivision of a state, or an agency or instrumentality of any one or more of the foregoing, if such annuity contract is not purchased under a plan which meets the requirements of G.S. 105-161(f)(1)a, and if the employee's rights under the annuity contract are nonforfeitable except for failure to pay future premiums. However, such portion of amounts contributed by such employer for such annuity contract on or after such rights become nonforfeitable shall be excluded from the gross income of the employee for the taxable year only to the extent that the aggregate of such amounts does not exceed the exclusion allowance (as herein defined) for such taxable year. In addition, the employee shall include in his gross income the amounts received under such annuity contract for the year received as provided in G.S. 105-141.1 (relating to annuities).
- b. For purposes of this subdivision, the "exclusion allowance" for an employee for the taxable year is an amount equal to the excess, if any, of (i) the amount determined by multiplying twenty percent (20%) of his includible compensation (as herein defined) by the number of years of service, over (ii) the aggregate of the amounts contributed by the employer for annuity contracts and excludible from gross income of the employee for any prior taxable year; provided, however, that in the case of an employee who makes an election under section 415(c)(4)(D) of the Internal Revenue Code of 1954 as amended to have the provisions of section 415 apply, the exclusion allowance of the employee shall be computed under the provisions of section 415 of the Internal Revenue Code of 1954 as amended.

For purposes of this subdivision, the term "includible compensation" means, in the case of any employee, the amount of compensation which is received from the employer described in the first paragraph of this subdivision, and which is includible in gross income for the most recent period (ending not later than the close of the taxable year) which under the following paragraph may be counted as one year of service. Such term does not include any amount contributed by the employer for any annuity contract to which this subdivision applies.

In determining the number of years of service for purposes of this subdivision there shall be included (i) one year for each full year during which the individual was a full-time employee of the organization purchasing the annuity for him, and (ii) a fraction of a year (determined as the Secretary of Revenue may prescribe) for each full year during which such individual was a part-time employee of such organization and for each part of a year during which such individual was a full-time or part-time employee of such organization. In no case shall the number of years of service be less than one.

If for any taxable year of the employee this subdivision applies

to two or more annuity contracts purchased by the employer, such contracts shall be treated as one contract.

For purposes of this subdivision and G.S. 105-141.1 (e) (relating to specific rules for computing employees' contributions to annuity contract), if rights of the employee under an annuity contract described in the first paragraph of this subdivision change from forfeitable to nonforfeitable rights, then the amount (determined without regard to this subsection) includible in gross income by reason of such change shall be treated as an amount contributed by the employer for such annuity contract as of the time such rights become nonforfeitable.

c. For purposes of this Division, amounts paid by an employer described in paragraph a of this subdivision to a custodial account which satisfies the requirements of section 401(f)(2) of the Internal Revenue Code of 1954 as amended shall be treated as amounts contributed by him for an annuity contract for his employee if the amounts are paid to provide a retirement benefit for that employee and are to be invested in regulated investment company stocks to be held in that custodial account. For purposes of this Division, a custodial account which satisfies the requirements of section 401(f)(2) of the Internal Revenue Code of 1954 as amended shall be treated in the same manner as an exempt trust qualifying under the provisions of G.S. 105-161(f)(1)a solely for purposes of taxing the income earned or received by such account.

- (18) Any amount not to exceed three thousand dollars (\$3,000) received by a taxpayer during any year as retired or retainer pay as a result of service in any of the armed forces of the United States.
- (19) Amounts earned during the income year by a pension, profit-sharing, stock bonus, or annuity plan established by an employer for the benefit of his employees or for himself and his employees, provided that such plan shall have been determined by the Internal Revenue Service to be a qualified plan for federal income tax purposes under the provisions of section 401(a) of the Internal Revenue Code of 1954 as amended; and amounts earned during the income year by an individual retirement account described in section 408(a) of the Internal Revenue Code of 1954 as amended, or an individual retirement annuity described in section 408(b) of the Internal Revenue Code of 1954 as amended, provided that such individual retirement account or individual retirement annuity is exempt from federal income taxation under section 408(e) of the Internal Revenue Code of 1954 as amended.
- (20) The amount of any reduction after December 31, 1973, in the retired or retainer pay of a member or former member of the uniformed services of the United States who has made an election under Chapter 73 of Title 10 of the United States Code to receive a reduced amount of retired or retainer pay.

In the case of any individual referred to in the preceding paragraph, all amounts received after December 31, 1973, as retired or retainer pay shall be excluded from gross income until there has been so excluded an amount equal to the consideration for the contract. The preceding sentence shall apply only to the extent that the amounts received would, but for such sentence, be includible in gross income.

For the purpose of this subdivision and subsection (i) of G.S. 105-141.1, the term "consideration for the contract" means, in respect of any individual, the sum of: (i) the total amount of the reductions before January 1, 1974, in his retired or retainer pay by reason of an election under Chapter 73 of Title 10 of the United States Code, and, (ii) any amounts deposited at any time by him pursuant to section 1438 of such Title 10.

- (21) No amount shall be included in gross income by reason of the

discharge of all or part of the indebtedness of an individual under a student loan if such discharge was pursuant to a provision of such loan under which all or part of the indebtedness of an individual would be discharged if the individual worked for a certain period of time in certain geographical areas or for certain classes of employers.

For the purposes of this subdivision, the term "student loan" has the same meaning as found in section 2117(b) of the Internal Revenue Code of 1954 as amended. (1939, c. 158, s. 317; 1941, c. 50, s. 5; c. 283; 1943, c. 400, s. 4; 1945, c. 708, s. 4; c. 752, s. 3; 1951, c. 643, s. 4; 1957, c. 1224; c. 1340, s. 4; 1961, c. 893; 1963, c. 1169, s. 2; 1965, c. 833; c. 1003, s. 1; 1967, c. 716, s. 1; cc. 871, 1025; c. 1110, s. 3; cc. 1151, 1221; 1969, cc. 178, 1272; 1971, cc. 792, 996; 1973, c. 287; c. 476, s. 193; c. 1287, s. 5; 1975, c. 275, s. 4; c. 559, ss. 3, 4, 6; 1977, c. 657, s. 5; c. 900, ss. 4, 6; 1977, 2nd Sess., c. 1221.)

Editor's Note. —

The second 1977, 2nd Sess., amendment, effective for income tax years beginning on or after Jan. 1, 1975, added subdivision (21) to subsection (b).

As subsection (a) was not changed by the amendment, it is not set out.

For comment discussing state adoption of federal taxing concepts, see 51 N.C.L. Rev. 834 (1973).

Amendment Effective January 1, 1980. —

Session Laws 1977, 2nd Sess., c. 1200, s. 2, effective Jan. 1, 1980, and applicable to taxable years beginning on and after that date, will add to subsection (a) of this section a new subdivision (22), to read as follows:

"(22) The amount of property taxes allowed under Division IV of this Article during the taxable year as a credit against the taxpayer's income tax."

§ 105-141.3. Adjusted gross income defined.

Editor's Note. —

For comment discussing state adoption of

federal taxing concepts, see 51 N.C.L. Rev. 834 (1973).

§ 105-159.1. Designation of tax by individual to political party. — (a) Every individual whose income tax liability for the taxable year is one dollar (\$1.00) or more may designate on his income tax return that one dollar (\$1.00) of the amount of tax paid by him to the Department of Revenue which shall thereafter be paid by the Secretary of Revenue, in the manner hereinafter prescribed, to the State Treasurer for the use of the political party designated by the taxpayer. Where any taxpayer elects to so designate but does not specify a particular political party, such funds shall thereafter be distributed, in the same manner as all other funds authorized by this section, to all political parties as defined herein upon a pro rata basis according to their respective party voter registrations. For purposes of this section, political party shall mean a political party which at the last preceding general State election received at least ten percent (10%) of the entire vote cast in the State for Governor, or for presidential electors, or a group of voters who by July 1 of the preceding calendar year, by virtue of a petition as a new political party, had duly qualified as a new political party within the meaning of Chapter 163 of the General Statutes of North Carolina.

(b) For each quarterly period beginning January 1, 1978, and for each quarterly period thereafter, on or before the last day of the month following the close of each quarterly period, the Secretary of Revenue shall remit all funds so designated above collected during the preceding quarter to the State Treasurer who shall thereafter deposit them in an interest-bearing account to be known as the North Carolina Election Campaign Fund. Any interest earned on funds so deposited shall be credited to the political party for which said funds were designated. A report to the State Treasurer, State Board of Elections and each State party chairman shall accompany each such remittance, and shall detail the amount of funds forwarded, the cumulative total of funds forwarded to date for the year, and an estimate of the probable total amount to be collected and forwarded for that calendar year.

(c) Notwithstanding the total amount of money actually collectively designated by taxpayers to be forwarded to the State Treasurer, on behalf of

any one particular political party, for any taxable year, any designated sums to one particular party in excess of three hundred thousand dollars (\$300,000) shall not be remitted to the State Treasurer, but shall instead be placed in the General Fund of the State.

(d) The Secretary of Revenue shall amend the income tax return in order that all taxpayers desiring to make the political contributions authorized herein shall do so by designating same on the front face of the tax return immediately above the signature line. The line of authorization for such designation shall be color contrasted with the color scheme of the remainder of the income tax return. Such return, or accompanying explanatory instruction, shall readily indicate that any such designations neither increase nor decrease an individual's tax liability. (1977, 2nd Sess., c. 1298, s. 1.)

Editor's Note. — Section 105-159.1 was originally enacted by Session Laws 1975, c. 775, s. 1, and expired by its own terms Dec. 31, 1977. See Session Laws 1975, c. 775, s. 3. The above § 105-159.1, similar in all respects to the original section, was enacted by Session Laws 1977, 2nd Sess., c. 1298, s. 1, effective with respect to taxable years beginning on or after Jan. 1, 1978.

Session Laws 1977, 2nd Sess., c. 1298, s. 3, provides: "This act shall become effective with respect to taxable years beginning on or after January 1, 1978, and shall expire on December 31, 1981."

DIVISION IV. MANUFACTURER'S INCOME TAX CREDIT

§ 105-163.01. Short title. — This Division shall be known and may be cited as the Manufacturer's Income Tax Credit Act. (1977, 2nd Sess., c. 1200, s. 3.)

Editor's Note. — Session Laws 1977, 2nd Sess., c. 1200, s. 6, provides that the act shall

become effective Jan. 1, 1980, and shall apply to taxable years beginning on and after that date.

§ 105-163.02. Definitions. — For the purposes of this Division and unless otherwise required by the context:

- (1) "Book value" of qualifying inventories means the net amount at which qualifying inventories are valued for North Carolina income tax purposes, and the date of such valuation shall be the first day of the taxable year.
- (2) "Cost of manufacturing" means the costs of producing the goods manufactured in this State. The term shall be interpreted so as to conform to generally accepted accounting practices in the industry. Unless in the opinion of the Secretary of Revenue the peculiar circumstances in any case justify a different meaning, such term shall be construed to include as elements of cost the following: the cost of materials put into production; the cost of labor applied to material conversions; and all of the other costs for services and facilities utilized in manufacturing, including factory superintendence, indirect labor, depreciation and other costs relating to factory buildings, machinery and equipment, factory supplies used, patent amortization, and factory light, heat and power. The "cost of materials put into production" shall mean the inventories of raw materials and goods in process of manufacture at the beginning of the taxable year plus purchases of raw materials, less inventories of raw materials and goods in process of manufacture at the end of the taxable year. The "cost of manufacturing" shall be for the taxable year as defined herein. Where the "taxable year" of the taxpayer is less than 12 months (or 52 weeks) the taxpayer shall annualize his cost of manufacturing. "Annualize" means the projection of an annual amount or rate ordinarily expressed in terms of a year, where the amount or rate to be projected has been experienced for less than a year, as in the case of a manufacturer having a short taxable year due to a change in his taxable year or due to his commencing operations in this State during his taxable year.

- (3) "Establishment" means a mill or plant in North Carolina at which manufacturing operations are performed, and which constitute an economic unit at a single physical location or site, unless otherwise indicated herein. The word "establishment" includes along with a manufacturing plant all sites in North Carolina where raw materials and/or partially manufactured goods are stored away from the manufacturing plant for use in such manufacturing plant. Two or more plants engaged in different steps of a manufacturing process constitute an establishment if goods must move through each plant before becoming a finished product even though the plants are at different sites in North Carolina. Two or more plants having a common ownership in North Carolina located at different sites and producing the same class or type of products may be deemed at the option of the taxpayer to be a single establishment for the purposes of this Division.
- (4) "Finished goods" means those articles of tangible personal property which are the products of the manufacturing process after all production in North Carolina by the manufacturer in this State has been completed and the products are being held for sale or are being held for shipment out of this State for further manufacture by the same manufacturer in another state before they are ready for sale.
- (5) "Goods in process of manufacture" means materials to which manufacturing services have been applied by the manufacturer in this State and which do not meet the definition of finished goods in (4) above.
- (6) "Inventory" means raw materials and supplies, goods finished and in the process of manufacture, and merchandise on hand, in transit, in storage or consigned to others at the end of the accounting period.
- (7) "Manufacturer" a taxpayer taxable under any provision of Article 4 of this Subchapter whose business is such as would cause him to be classified as a manufacturer in the Standard Industrial Classification Manual whose publication by the Executive Office of the President, Office of Management and Budget, occurred next before January 1, 1978; provided, however, that fabricating processors whose cost of materials consumed is seventy-five percent (75%) or more of their cost of manufacturing shall not be deemed to be manufacturers under this division. Costs incurred in performance of construction activities by a fabricator shall not be included in cost of manufacturing for purposes of this Division.
- (8) "Property taxes" means taxes levied by counties and municipalities in this State under authority of the Machinery Act on qualifying inventories located in this State. The term shall not include any amounts paid as costs, penalties, interest or other charges notwithstanding the fact that such amounts may be defined as taxes under the Machinery Act. The term does not include taxes paid subsequent to January 1, 1980, with respect to inventories listed for taxation prior to such effective date, or taxes paid with respect to inventories which the taxpayer had failed to list for a regular listing period prior to January 1, 1980.
- (9) "Qualifying inventories" means inventories of raw materials and goods in process of manufacture in this State which have been assessed for property tax purposes. The book value of qualifying inventories shall be determined as of the valuation date established for inventories for property tax purposes, pursuant to G.S. 105-285(c), which inventories give rise to the total property tax used in computing the manufacturer's income tax credit allowed under G.S. 105-163.03(a).
- (10) "Raw materials" means those articles of tangible personal property which are held by a manufacturer for use as ingredient or component parts of finished goods to be manufactured by the manufacturer in North Carolina.
- (11) "Taxable year" shall have the meaning ascribed to such term in G.S. 105-135(9) and G.S. 105-130.2(5), as appropriate. In addition, "taxable

year" shall be that taxable year for which a manufacturer files an income tax return upon which the tax credit provided for under this Division is claimed.

- (12) "Total property tax" means the total amount of property tax paid by a manufacturer to counties and municipalities in this State during his taxable year on qualifying inventories. The term does not include taxes paid subsequent to January 1, 1980, with respect to inventories listed for taxation prior to such effective date, or taxes paid with respect to inventories which the taxpayer had failed to list for a regular listing period prior to January 1, 1980. (1977, 2nd Sess., c. 1200, s. 3.)

§ 105-163.03. Tax credit. — (a) A credit against the income tax imposed in this Article may be claimed by a manufacturer for that portion of property taxes paid by such manufacturer to counties and municipalities in this State upon qualifying inventories on hand on the first day of the taxable year which were listed for taxation and upon which taxes have been assessed and paid, the amount of the credit shall be determined as follows:

- (1) The book value of the manufacturer's qualifying inventory in each establishment shall be divided by the manufacturer's cost of manufacturing for that establishment, the quotient of which division shall be determined to the nearest five decimal places;
- (2) From the quotient determined in (1) above shall be subtracted .15;
- (3) If the amount determined in (2) above is zero or less than zero, the tax credit shall be zero;
- (4) If the difference obtained in (2) above is greater than zero, that difference shall be divided by the amount obtained in (1) above, the quotient of which division shall be determined to the nearest five decimal places;
- (5) If the amount determined in (2) above is greater than zero, the total property tax on qualifying inventories paid by each establishment of the manufacturer to counties and municipalities in this State shall be multiplied by the amount determined in (4) above for the same establishment, the result of which shall be the manufacturer's credit for that establishment.
- (6) The sum of credits applicable to all of the manufacturer's establishments shall be the manufacturer's income tax credit.
- (7) The value of inventories of raw materials located in the State but not at a manufacturing establishment shall be apportioned to establishments for the purposes of paragraphs (1) through (5) if inventories at such location are shipped to more than one establishment. The value shall be apportioned by the proportion of shipments from the site of the inventories to each establishment during the taxable year. If different types of materials are shipped to two or more manufacturing plants, the value of the materials of each type shall be attributed to the plant at which such materials are customarily used; provided that if any type of such material is used at more than one establishment, the qualifying inventories of such type of material shall be apportioned between the establishments at which used in the proportion of shipments from the site of the inventories to each establishment during the taxable year. Where qualifying inventories are stored at one manufacturing establishment but are in fact used to supply raw materials to one or more other establishments, the value of such inventory shall be attributed to each establishment at which the inventories are used in accordance with the provisions of this paragraph for attributing the value of inventories not located at a manufacturing establishment.
- (8) Where the "total property tax" includes taxes which were paid after the time during which said taxes could have been paid at par pursuant to G.S. 105-360(a) (1), the tax credit for such property taxes shall be

computed using the ratios determined under paragraphs (1) through (4) herein for the taxable year in which such property taxes would have been payable at par.

(b) The manufacturer's income tax credit shall be applied against the income tax due from the manufacturer for the taxable year in which the property tax which is the basis for the credit was actually paid. If such credit exceeds the income tax due from, or if a loss is sustained by, the manufacturer for such taxable year, the excess credit may be carried forward for not more than five taxable years next succeeding the taxable year in which the credit first became available to the manufacturer. In such case, the excess credit shall be applied against income tax due in the earliest taxable year possible and to its maximum extent before any excess credit may be carried forward to a later taxable year.

(c) If any portion of the property taxes used in calculating a credit in G.S. 105-163.03 is at any time credited or refunded to the manufacturer by the county or municipality which imposed the tax, the manufacturer shall notify the Secretary of Revenue within 90 days, who shall recompute the tax due for the income tax year in which the credit was claimed. Any additional tax found to be due therefor shall be assessed as provided in G.S. 105-241.1.

(d) In order for a manufacturer to be entitled to the tax credit provided in G.S. 105-163.03, said manufacturer, in listing his property for taxation pursuant to the provisions of G.S. 105-285, shall provide to the taxing authority a breakdown of his inventories into raw materials, goods in process of manufacture, finished goods, and supplies and other property included in the listing as "inventories," and said manufacturer shall attach a copy of such listings with his income tax return upon which the tax credit is claimed. (1977, 2nd Sess., c. 1200, s. 3.)

§ 105-163.04. Manufacturer must keep records. — Every manufacturer shall maintain and preserve such books and records as may be necessary to determine or verify the amount of income tax credit to which he may be entitled under the provisions of this Article. It shall be the duty of such manufacturer to support fully each calculation by means of which he has derived the credit. Such books and records shall be open for examination at all reasonable times to the Secretary or any of his duly authorized agents. The requirements of this section shall be in addition to any other record-keeping requirements imposed by other provisions of this Subchapter. (1977, 2nd Sess., c. 1200, s. 3.)

ARTICLE 5.

Schedule E. Sales and Use Tax.

DIVISION II. TAXES LEVIED.

Part 1. Retail Sales Tax.

§ 105-164.4. Imposition of tax; retailer. — There is hereby levied and imposed, in addition to all other taxes of every kind now imposed by law, a privilege or license tax upon every person who engages in the business of selling tangible personal property at retail, renting or furnishing tangible personal property or the renting and furnishing of rooms, lodgings and accommodations to transients, in this State, the same to be collected and the amount to be determined by the application of the following rates against gross sales and rentals, to wit:

(1) At the rate of three percent (3%) of the sales price of each item or article of tangible personal property when sold at retail in this State, the tax to be computed on total net taxable sales as defined herein but for the purpose of computing the amount due the State each and every taxable retail sale, or retail sales upon which the tax has been collected, or the amount of tax actually collected, whichever be greater and whether or not erroneously collected, shall be included in the computation of tax

due the State. Provided, however, that in the case of the sale of any aircraft, railway locomotive, railway car or the sale of any motor vehicle or boat, the tax shall be only at the rate of two percent (2%) of the sales price, but at no time shall the maximum tax with respect to any one such aircraft, railway locomotive, railway car or motor vehicle or boat, including all accessories attached thereto at the time of delivery thereof to the purchaser, be in excess of one hundred twenty dollars (\$120.00).

For the purposes of this section, the words "motor vehicle" mean any vehicle which is self-propelled and designed primarily for use upon the highways, any vehicle which is propelled by electric power obtained from trolley wires but not operated upon rails, and any vehicle designed to run upon the highways which is pulled by a self-propelled vehicle, but shall not include any implement of husbandry, farm tractor, road construction or maintenance machinery, or equipment, special mobile equipment as defined in G.S. 20-38, nor any vehicle designed primarily for use in work off the highway. For the purposes of this subdivision, the sale separately of a new motor vehicle chassis and a new motor vehicle body to be installed thereon, whether by the same retailer or different retailers, shall be subject only to the tax herein prescribed with respect to a single motor vehicle.

Provided further, in addition to all other taxes, there is hereby levied and imposed upon every person for the privilege of using the streets and highways of this State, a tax at the rate of two percent (2%) of the sales or purchase price of any motor vehicle, new chassis and/or new body as defined, described and limited in this section, including all accessories attached thereto at the time of delivery thereof to the purchaser, purchased or acquired for use on the streets and highways of this State, but at no time shall said tax exceed one hundred twenty dollars (\$120.00) with respect to any one motor vehicle, and the same shall be paid to the Secretary of Revenue at the time of applying for certificates of title or registration of such motor vehicle. No certificate of title or registration plate shall be issued for same unless and until said tax has been paid: Provided, however, if such person so applying for certificate of title or registration and license plate for such motor vehicle shall furnish to the Secretary of Revenue a certificate from a motor vehicle dealer licensed to do business in this State, upon a form furnished by the Secretary, certifying that such person has paid the tax thereon levied in this Article, the tax herein levied shall be remitted to such person to avoid in effect double taxation on said motor vehicle under this Article. It is not the intention of this section to impose any tax upon a body mounted upon the chassis of a motor vehicle which temporarily enters the State for the purpose of having such body mounted thereon by the manufacturer thereof.

The tax levied under this subdivision shall not apply to the owner of a motor vehicle who purchases or acquires said motor vehicle from some person, firm or corporation who or which is not a dealer in new and/or used motor vehicles if the tax levied under this Article has been paid with respect to said motor vehicle.

Provided further, the tax shall be only at the rate of one percent (1%) of the sales price on the following items:

- a. Horses or mules by whomsoever sold.
- b. Semen to be used in the artificial insemination of animals.
- c. Sales of fuels to farmers to be used by them for any farm purposes other than preparing food, heating dwellings and other household purposes. The quantity of fuel purchased or used at any one time shall not in any manner be a determinative factor as to whether any sale or use of fuel is or is not subject to the one percent (1%) rate of tax imposed herein.
- d. Sales of fuel to manufacturing industries and manufacturing plants for use in connection with the operation of such industries and

plants other than sales of fuels to be used for residential heating purposes. The quantity of fuel purchased used at any one time shall not in any manner be a determinative factor as to whether any sale or use of fuel is or is not subject to the one percent (1%) rate of tax imposed herein.

- e. Sales of fuel to commercial laundries or to pressing and dry-cleaning establishments for use in machinery used in the direct performance of the laundering or the pressing and cleaning service.
- f. Sales to freezer locker plants of wrapping paper, cartons and supplies consumed directly in the operation of such plant.

Provided further, the tax shall be only at the rate of one percent (1%) of the sales price, subject to a maximum tax of eighty dollars (\$80.00) per article, on the following items:

- g. Sales of machines and machinery, whether animal or motor drawn or operated, and parts and accessories for such machines and machinery to farmers for use by them in the planting, cultivating, harvesting or curing of farm crops, and sales of machines and machinery and parts and accessories for such machines and machinery to dairy operators, poultry farmers, egg producers, and livestock farmers for use by them in the production of dairy products, poultry, eggs or livestock.

The term "machines and machinery" as used in this subdivision is defined as follows:

The term shall include all vehicular implements, designed and sold for any use defined in this subdivision, which are operated, drawn or propelled by motor or animal power, but shall not include vehicular implements which are operated wholly by hand, and shall not include any motor vehicles required to be registered under Chapter 20 of the General Statutes.

The term shall include all nonvehicular implements and mechanical devices designed and sold for any use defined in this subdivision, which have moving parts, or which require the use of any motor or animal power, fuel, or electricity in their operation but shall not include nonvehicular implements which have no moving parts and are operated wholly by hand.

The term shall also include metal flues sold for use in curing tobacco, whether such flues are attached to handfired furnaces or used in connection with mechanical burners.

- h. Sales of mill machinery or mill machinery parts and accessories to manufacturing industries and plants, and sales to contractors and subcontractors purchasing mill machinery or mill machinery parts and accessories for use by them in the performance of contracts with manufacturing industries and plants, and sales to subcontractors purchasing mill machinery or mill machinery parts and accessories for use by them in the performance of contracts with general contractors who have contracts with manufacturing industries and plants.
- i. Sales of central office equipment and switchboard and private branch exchange equipment to telephone and telegraph companies regularly engaged in providing telephone and telegraph service to subscribers on a commercial basis.
- j. Sales to commercial laundries or to pressing and dry-cleaning establishments of machinery used in the direct performance of the laundering or the pressing and cleaning service and of parts and accessories thereto.
- k. Sales to freezer locker plants of machinery used in the direct operation of said freezer locker plant and of parts and accessories thereto.
- l. Sales of broadcasting equipment and parts and accessories thereto

and towers to commercial radio and television companies which are under the regulation and supervision of the Federal Communications Commission.

- m. Sales to farmers of bulk tobacco barns and racks and all parts and accessories thereto and similar apparatus used for the curing and drying of any farm produce.

(1977, 2nd Sess., c. 1218.)

Editor's Note. —

The 1977, 2nd Sess., amendment, effective July 1, 1977, inserted "and subcontractors" in paragraph h of subdivision (1), deleted "direct" preceding "performance of contracts" where that phrase first appears in paragraph h and

added to paragraph h the language beginning "and sales to subcontractors purchasing mill machinery."

As the other subdivisions were not changed by the amendment, only the introductory paragraph and subdivision (1) are set out.

Part 4. General Provisions.

§ 105-164.12. Freight or delivery transportation charges. — Freight delivery, or other like transportation charges connected with the sale of tangible personal property are subject to the sales and use tax if title to the tangible personal property being transported passes to the purchaser at the destination point. Where title to the tangible personal property being transported passes to the purchaser at the point of origin, the freight or other transportation charges are not subject to the sales tax. For the purposes of this section it is immaterial whether the retailer or purchaser actually pays for any charges made for transportation, whether the charges were actually paid by one for the other, or whether a credit or allowance is made or given for such charges. Nothing in this section shall operate to exclude from the use tax any freight delivery or other like transportation charges. Such charges shall be included as a portion of the cost price and subject to the use tax. (1957, c. 1340, s. 5; 1959, c. 1259, s. 5.)

Editor's Note. — This section is set out to correct a typographical error in the third sentence in the Replacement Volume.

DIVISION III. EXEMPTIONS AND EXCLUSIONS.

§ 105-164.13. Retail sales and use tax. — The sale at retail, the use, storage or consumption in this State of the following tangible personal property is specifically exempted from the tax imposed by this Article:

- (2) Seeds; remedies, vaccines, medications, and feeds for livestock and poultry; rodenticides, insecticides, herbicides, fungicides, and pesticides for livestock, poultry, and agriculture; defoliant for use on cotton or other crops; plant growth inhibitors, regulators, or stimulators for agriculture including systemic and contact or other sucker control agents for tobacco and other crops. (1977, 2nd Sess., c. 1219, s. 43.6.)

Editor's Note. —

The 1977, 2nd Sess., amendment, effective July 1, 1978, inserted "remedies, vaccines, medications and" near the beginning of subdivision (2) and made minor changes in wording and punctuation in that subdivision.

Session Laws 1977, 2nd Sess., c. 1219, s. 57,

contains a severability clause.

As the rest of the section was not changed by the amendment, only the introductory language and subdivision (2) are set out.

Poultry Coops. — Where plaintiffs alleged that they "sell their coops to farmers, poultrymen, and persons, firms, and

corporations engaged in the poultry business, and such coops are used for packaging, shipment, and delivery of tangible personal property which is sold either at wholesale or retail, or such coops are delivered with the chickens or turkeys to the customer," and defendant admitted "that the plaintiffs sell their coops to farmers, poultrymen and persons, firms and corporations engaged in the poultry business, and that such coops are used by such customers in the delivery of live poultry, which is sold by such customers at either wholesale or

retail," such allegations in the complaint and admissions in the answer are not sufficient to exempt plaintiffs' sales of coops from the sales tax within the purview and intent of subdivision (23) of this section, since there was no allegation in the complaint to the effect that when plaintiffs' vendees sold poultry the coops constituted a part of the sale of such poultry and were delivered with the poultry to the customer. *Sale v. Johnson*, 258 N.C. 749, 129 S.E. 2d 465 (1963). This paragraph is set out to correct an error in the Replacement Volume. — Ed. note.

ARTICLE 6.

Schedule G. Gift Taxes.

§ 105-188. Gift taxes; classification of beneficiaries; exemptions; rates of tax.

Editor's Note. —

For comment discussing state adoption of

federal taxing concepts, see 51 N.C.L. Rev. 834 (1973).

ARTICLE 7.

Schedule H. Intangible Personal Property.

§ 105-199. Money on deposit. — All money on deposit (including certificates of deposit and postal savings) with any bank or other corporation, firm or person doing a banking business, and stock-owned savings and loan association in this State, whether such money be actually in or out of this State, having a business, commercial or taxable situs in this State, shall be subject to an annual tax, which is hereby levied, of ten cents (10¢) on every one hundred dollars (\$100.00) of the total amount of such deposit without deduction for any indebtedness or liabilities of the taxpayer.

For the purpose of determining the amount of deposits subject to this tax every such bank or other corporation, firm or person doing a banking business and every stock-owned savings and loan association shall set up the credit balance of each depositor on the fifteenth day of each February, May, August, and November in the calendar year next preceding the due date of tax return, and the average of such quarterly credit balances shall constitute the amount of deposit of each depositor subject to the tax herein levied; for the purposes of this section accounts having an average of quarterly balance for the year of less than three hundred dollars (\$300.00) may be disregarded.

The tax levied in this section upon money on deposit shall be paid by the cashier, treasurer or other officer or officers of every such bank or other corporation, firm or person doing a banking business in this State and of every such stock-owned savings and loan association in this State by report and payment to the Secretary of Revenue on or before April 15 of each year; any taxes so paid as agent for the depositor shall be recovered from the owners thereof by the bank or other corporation, firm or person doing a banking business in this State and by the stock-owned savings and loan association in this State by deduction from the account of the depositor on November 16 of each year or on such date thereafter as in the ordinary course of business it becomes convenient to make such charge. The bank or stock-owned savings and loan association may immediately report and pay the tax due on any account closed out during any quarter in which the bank or stock-owned savings and loan

association has withheld the amount of the tax. The tax on deposits represented by time certificates shall be chargeable to the original depositor unless such depositor has given notice to the depository bank or stock-owned savings and loan association of transfer of such certificate of deposit. Accounts that have been closed during the year, leaving no credit balance against which the tax can be charged, may be reported separately to the Secretary of Revenue and the tax due on such accounts shall become a charge directly against the depositor, and such tax may be collected by the Secretary of Revenue from the depositor in the same manner as other taxes levied in this act; the bank or other corporation, firm or person doing a banking business in this State and the stock-owned savings and loan association shall not be held liable for the payment of the tax due on accounts so reported. None of the provisions of this section shall be construed to relieve any taxpayer of liability for a full and complete return of postal savings and of all money on deposit outside this State having business, commercial or taxable situs in this State.

The tax levied in this section shall not apply to deposits by one bank or stock-owned savings and loan association in another bank or stock-owned savings and loan association, nor to deposits of the United States, State of North Carolina, political subdivisions of this State or agencies of this State or agencies of such governmental units. Deposits representing the actual payment of benefits to World War veterans by the federal government, when not reinvested, shall not be subject to the tax levied in this section. Further deposits in North Carolina banks and North Carolina stock-owned savings and loan associations by nonresident individuals and foreign corporations, when such deposits are not related to business activities in this State, shall not be subject to the tax levied in this section. The tax levied in this section shall not apply to deposits of foreign and alien insurance companies which pay the two and one-half percent (2½%) gross premium tax levied by G.S. 105-228.5. (1939, c. 158, s. 701; 1945, c. 708, s. 8; 1947, c. 501, s. 7; 1949, c. 392, s. 5; 1955, c. 19, s. 1; 1977, 2nd Sess., c. 1220.)

Editor's Note. —

The 1977, 2nd Sess., amendment, effective Jan. 1, 1978, made this section applicable to money on deposit with stock-owned savings and

loan associations. The amendment also inserted "of this State or agencies" near the end of the first sentence of the fourth paragraph.

ARTICLE 9.

Schedule J. General Administration; Penalties and Remedies.

§ 105-230. Charter canceled for failure to report.

Cited in *Philbin Invs., Inc. v. Orb. Enterprises, Ltd.*, 35 N.C. App. 622, 242 S.E.2d 176 (1978).

§ 105-266. Overpayment of taxes to be refunded with interest.

Claim for Refund Made within Three Years of Date to Which Time for Filing Tax Was Extended by Secretary of Revenue Is Timely Made. — See Opinion of Attorney General to Mr.

W.B. Matthews, Department of Revenue, 44 N.C.A.G. 247 (1975). Opinion of Attorney General to Mr. B.W. Brown, Department of Revenue, 41 N.C.A.G. 509 (1971), withdrawn.

§ 105-266.1. Refunds of overpayment of taxes.

This section may not be used to obtain a refund of taxes unlawfully collected. Coca-Cola

Co. v. Coble, 293 N.C. 565, 238 S.E.2d 780 (1977). This section by its express terms, confers no

authority on the Secretary to refund taxes which, at the time they were collected, were unlawful but not erroneous or incorrect. *Coca-Cola Co. v. Coble*, 293 N.C. 565, 238 S.E.2d 780 (1977).

The Secretary of Revenue has no authority under this section to order the refund of an invalid or illegal tax, since questions of

constitutionality are for the courts. *Coca-Cola Co. v. Coble*, 293 N.C. 565, 238 S.E.2d 780 (1977).

This section fails to provide an exception to the general rule that voluntary payments of unconstitutional taxes are not refundable. *Coca-Cola Co. v. Coble*, 293 N.C. 565, 238 S.E.2d 780 (1977).

§ 105-267. Taxes to be paid; suits for recovery of taxes.

Cited in *Big Bear of N.C., Inc. v. City of High Point*, 33 N.C. App. 563, 235 S.E.2d 911 (1977).

§ 105-268. Reciprocal comity.

Editor's Note. —

For article, "Recognition of Foreign Judgments," see 50 N.C.L. Rev. 21 (1971).

§ 105-268.1. Agreements to coordinate the administration and collection of taxes.

Editor's Note. —

For article, "Recognition of Foreign Judgments," see 50 N.C.L. Rev. 21 (1971).

§ 105-268.2. Expenditures and commitments authorized to effectuate agreements.

Editor's Note. —

For article, "Recognition of Foreign Judgments," see 50 N.C.L. Rev. 21 (1971).

§ 105-268.3. Returns to be filed and taxes paid pursuant to agreements.

Editor's Note. —

For article, "Recognition of Foreign Judgments," see 50 N.C.L. Rev. 21 (1971).

§ 105-269. Extraterritorial authority to enforce payment.

Editor's Note. —

For article, "Recognition of Foreign Judgments," see 50 N.C.L. Rev. 21 (1971).

SUBCHAPTER II. LISTING, APPRAISAL, AND ASSESSMENT OF PROPERTY AND COLLECTION OF TAXES ON PROPERTY.

ARTICLE 11.

Short Title, Purpose, and Definitions.

§ 105-271. Official title.

Editor's Note. —

For note on procedural developments in the

discovery of property unlisted for purposes of ad valorem taxation, see 51 N.C.L. Rev. 531 (1973).

Use, rather than ownership or objective, is the primary exempting characteristic of this Subchapter. In re North Carolina Forestry

Foundation, Inc., 35 N.C. App. 414, 242 S.E.2d 492 (1978).

§ 105-273. Definitions.

"Intangible Personal Property". — Leases are intangible personal property only when they are leases in "exempted real property." Thus, the only leases taxable to the lessee are leases on fees exempt from taxation on the lessor. Where the fee is nonexempt, the lease is not

intangible personal property and is taxable to the owner, as is all real and personal property not exempt under § 105-274. In re North Carolina Forestry Foundation, Inc., 35 N.C. App. 430, 242 S.E.2d 502 (1978).

ARTICLE 12.

Property Subject to Taxation.

§ 105-274. Property subject to taxation.

Editor's Note. —

For survey of 1974 case law on taxation of personal property owned by nonresidents, see 53 N.C.L. Rev. 1132 (1975).

When Lease Taxable to Lessee and When to Lessor. — Leases are intangible personal property only when they are leases in "exempted real property." Thus, the only leases taxable to

the lessee are leases on fees exempt from taxation on the lessor. Where the fee is nonexempt, the lease is not intangible personal property and is taxable to the owner as is all real and personal property not exempt under this section. In re North Carolina Forestry Foundation, Inc., 35 N.C. App. 430, 242 S.E.2d 502 (1978).

§ 105-275. Property classified and excluded from the tax base.

Amendment Effective January 1, 1980. — Session Laws 1977, 2nd Sess., c. 1200, s. 4, effective Jan. 1, 1980 and applicable to taxable years beginning on and after that date, will amend subdivision (1) of this section to read as set out below:

"(1) Cotton, tobacco, other farm products, goods, wares, and merchandise held or stored for shipment to any foreign country, except any such products, goods, wares, and merchandise that have been so stored for more than 48 months on the date as of which property is listed for taxation. Such property shall be listed (by quantity only, and with a statement that it is being held for export) in the county in which it is located on the tax listing date, but shall not be assessed or taxed. On the first tax listing date following 48 months of storage, any such property which has not been exported shall be listed, assessed and taxed in the same manner as other taxable property. (The purpose of this classification is to encourage the development of the ports of North Carolina.)"

The term "protected natural area" in subdivision (12) of this section means property

which, insofar as possible, is kept in a pristine state free from those interferences which any given generation may feel to be "improvements" on nature. The General Assembly intended the protection of such natural areas be of a passive nature designed to prevent manmade or natural disasters and not of an active nature envisioned as "improvements" of the areas. In re North Carolina Forestry Foundation, Inc., 35 N.C. App. 414, 242 S.E.2d 492 (1978).

Use, rather than ownership or objective, is the primary exempting characteristic of this Subchapter. In re North Carolina Forestry Foundation, Inc., 35 N.C. App. 414, 242 S.E.2d 492 (1978).

Not only the purpose for holding the real property but also its actual use determines whether it is to be excluded from or included in the tax base. In re North Carolina Forestry Foundation, Inc., 35 N.C. App. 414, 242 S.E.2d 492 (1978).

Cited in In re North Carolina Forestry Foundation, Inc., 35 N.C. App. 430, 242 S.E.2d 502 (1978).

§ 105-278. Historic properties.

Cited in *In re North Carolina Forestry Foundation, Inc.*, 35 N.C. App. 414, 242 S.E.2d 492 (1978).

§ 105-278.4. Real and personal property used for educational purposes.

Applied in *In re North Carolina Forestry Foundation, Inc.*, 35 N.C. App. 414, 242 S.E.2d 492 (1978).

Cited in *In re North Carolina Forestry Foundation, Inc.*, 35 N.C. App. 430, 242 S.E.2d 502 (1978).

§ 105-278.6. Real and personal property used for charitable purposes.

Applied in *In re North Carolina Forestry Foundation, Inc.*, 35 N.C. App. 414, 242 S.E.2d 492 (1978).

Cited in *In re North Carolina Forestry Foundation, Inc.*, 35 N.C. App. 430, 242 S.E.2d 502 (1978).

§ 105-279. Timberlands owned by the State; payments in lieu of taxes.

Cited in *In re North Carolina Forestry Foundation, Inc.*, 35 N.C. App. 414, 242 S.E.2d 492 (1978); *In re North Carolina Forestry*

Foundation, Inc., 35 N.C. App. 430, 242 S.E.2d 502 (1978).

§ 105-282.1. Applications for property tax exemption or exclusion.

Failure of a county to respond to an application for exemption does not require that it be deemed accepted for that year and the failure to respond to the application for exemption does not establish a presumption,

rebuttable or otherwise, that the application for exemption has been granted. *In re North Carolina Forestry Foundation, Inc.*, 35 N.C. App. 414, 242 S.E.2d 492 (1978).

ARTICLE 13.*Standards for Appraisal and Assessment.*

§ 105-283. Uniform appraisal standards. — All property, real and personal, shall as far as practicable be appraised or valued at its true value in money. When used in this Subchapter, the words "true value" shall be interpreted as meaning market value, that is, the price estimated in terms of money at which the property would change hands between a willing and financially able buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of all the uses to which the property is adapted and for which it is capable of being used. For the purposes of this section, the acquisition of an interest in land by an entity having the power of eminent domain with respect to the interest acquired shall not be considered competent evidence of the true value in money of comparable land. (1939, c. 310, s. 500; 1953, c. 970, s. 5; 1955, c. 1100, s. 2; 1959, c. 682; 1967, c. 892, s. 7; 1969, c. 945, s. 1; 1971, c. 806, s. 1; 1973, c. 695, s. 11; 1977, 2nd Sess., c. 1297.)

Editor's Note. —

The 1977, 2nd Sess., amendment, effective for

tax years beginning Jan. 1, 1979, added the last sentence.

ARTICLE 14.

*Time for Listing and Appraising Property for Taxation.***§ 105-286. Time for general reappraisal of real property.**

Cited in *In re North Carolina Forestry Foundation, Inc.*, 35 N.C. App. 414, 242 S.E.2d 492 (1978).

§ 105-287. Real property to be appraised in years in which general reappraisal is not conducted.

Cited in *In re North Carolina Forestry Foundation, Inc.*, 35 N.C. App. 414, 242 S.E.2d 492 (1978).

ARTICLE 15.

*Duties of Department and Property Tax Commission as to Assessments.***§ 105-289.1. Department of Revenue; duties; manufacturers' inventories.**

—(a) In the exercise of its supervision over the valuation of property, as provided for in G.S. 105-288, the Department of Revenue shall have the authority to review the valuation of "qualifying inventories" of "manufacturers," as those terms are used in the Manufacturers Income Tax Credit Act. If, in the opinion of the Secretary of Revenue, any of such inventories are valued in excess of their true value in money, the Secretary shall determine their true value and shall order the taxing unit to reduce the value of such inventories to their true value and to recalculate the tax thereon. Notwithstanding any provisions of law to the contrary, if the manufacturer has overpaid the tax as recalculated, the taxing unit shall thereupon make any refund which is found to be due to the manufacturer.

(b) The Secretary's order shall be in writing and shall be served upon the appropriate local taxing authority (as defined in G.S. 105-289(e)) and upon the manufacturer by any means authorized for the service of written notices in Rule 5 of the Rules of Civil Procedure. However, any order served more than five years after the date as of which the inventories which are the subject of the order were required to be listed shall be void and of no effect.

(c) If the taxing unit shall be aggrieved by the Secretary's order, it may, within 30 days after service of the order, except to the order and appeal therefrom to the Property Tax Commission by filing a written notice of appeal and a written statement of the grounds of appeal with the Secretary of Revenue and with the Property Tax Commission. Upon timely appeal, the Property Tax Commission shall proceed under the provisions of G.S. 105-290(b). The parties to the proceeding shall be the taxing unit and the Secretary of Revenue. (1977, 2nd Sess., c. 1200, s. 5.)

Editor's Note. — Session Laws 1977, 2nd Sess., c. 1200, s. 6, provides that the act shall become effective Jan. 1, 1980, and shall apply to

taxable years beginning on and after that date.

The Rules of Civil Procedure are found in § 1A-1.

ARTICLE 17.

*Administration of Listing.***§ 105-302. In whose name real property is to be listed.**

Editor's Note. — For note on procedural developments in the discovery of property unlisted for purposes of ad valorem taxation, see

51 N.C.L. Rev. 531 (1973).

Cited in *Henderson County v. Osteen*, 292 N.C. 692, 235 S.E.2d 166 (1977).

§ 105-303. Obtaining information on real property transfers; permanent listing.

Cited in *In re North Carolina Forestry Foundation, Inc.*, 35 N.C. App. 414, 242 S.E.2d 492 (1978).

§ 105-304. Place for listing tangible personal property.

Editor's Note. —

For survey of 1974 case law on taxation of

personal property owned by nonresidents, see 53 N.C.L. Rev. 1132 (1975).

§ 105-312. Discovered property; appraisal; penalty.

Editor's Note. —

For note on procedural developments in the discovery of property unlisted for purposes of ad valorem taxation, see 51 N.C.L. Rev. 531 (1973).

"Listed in the Name of the Taxpayer," etc., As Used in Subsection (c). — In light of the definition of "discovered property" in subdivision (a)(1), the phrase "listed in the name of the taxpayer who listed it for the preceding

year" as used in subsection (c) of this section includes a listing of property in the name of the taxpayer both when listed personally by the taxpayer and when listed in the taxpayer's name by "any other person," according to law, for the preceding year. In *re North Carolina Forestry Foundation, Inc.*, 35 N.C. App. 414, 242 S.E.2d 492 (1978).

ARTICLE 18.

*Reports in Aid of Listing.***§ 105-315. Reports by persons having custody of tangible personal property of others.**

Editor's Note. —

For survey of 1974 case law on taxation of

personal property owned by nonresidents, see 53 N.C.L. Rev. 1132 (1975).

§ 105-316.1. Tax permit required to move mobile home. — (a) In order to protect the local taxing units of this State against the nonpayment of ad valorem taxes on mobile homes, it is hereby declared to be unlawful for any person other than a mobile home manufacturer or retailer to remove or cause to be removed any mobile home situated at a premises in this State without first obtaining a tax permit from the tax collector of the county in which the mobile home is situated. The tax permit shall be conspicuously displayed near the license tag on the rear of the mobile home at all times during its transportation. Permits required by this Article may be obtained at the office of the county tax collector during normal business hours.

(b) Except as provided in G.S. 105-316.4, manufacturers, retailers and licensed carriers of mobile homes shall not be required to obtain the tax permits required

by this section. Persons or firms transporting mobile homes shall, however, be responsible for seeing that a proper license tag, and when required under this section, a tax permit, are properly displayed thereon at all times during their transportation. (1975, c. 881, s. 1; 1977, 2nd Sess., c. 1187, ss. 1, 2.)

Editor's Note. —
The 1977, 2nd Sess., amendment substituted

“tax permit” for “moving permit” in two places
in subsection (a) and rewrote subsection (b).

§ 105-316.4. **Issuance of permits under repossession.** — Notwithstanding the provisions of G.S. 105-316.2(a) and 105-316.3(a), above, any person who intends to take possession of a mobile home, whether by judicial or nonjudicial authority, as a holder of a lien on said mobile home shall apply for, and be issued, the permit herein provided without paying all taxes due to be paid by the owner of the mobile home being repossessed, upon notifying the tax collector of the location in North Carolina to which the mobile home is to be taken. At the time of notification the tax collector shall render to the holder of the lien a statement of taxes due against only the mobile home. Within seven days of the issuance of the permit the applicant shall pay to the tax collector the taxes due as set forth in the statement.

Notwithstanding the foregoing, any applicant who is a nonresident of North Carolina must pay the taxes due as set forth above at the time of notification to the tax collector and application for the permit.

Upon issuance of the permit and the payment of any taxes as prescribed herein, the mobile home shall no longer be subject to levy or attachment of any lien for any other taxes then owed by the owner thereof, whether or not previously determined. (1975, c. 881, s. 1; 1977, 2nd Sess., c. 1187, s. 3.)

Editor's Note. —
The 1977, 2nd Sess., amendment, in the first
paragraph inserted “in North Carolina” and
substituted “to be taken” for “being taken and
stored and obtaining a statement from the tax
collector of any personal property taxes owed on
the mobile home only” in the first sentence,

added the second sentence, and in the third
sentence substituted “the” for “such a”
preceding “permit” and deleted “hereunder”
following “taxes due” and “including penalties
and interest” at the end of the sentence. The
amendment also added the second and third
paragraphs.

§ 105-316.5. **Form of permit.** — The permit shall be in substantially the following form:

TAX PERMIT

County of Permit Number

State of North Carolina Date of Issuance

Permission is hereby granted to:
(Name & address of owner)

.....
(Name & address of carrier)

to remove the following described mobile home:
.....
(Make, model, size, serial number, etc.)

From:
(Address)

To:
(Address)

This permit is issued in accordance with the provisions of G.S. 105-316.1 through G.S. 105-316.8 of the General Statutes of North Carolina.

(Signed)

Tax Collector
(or Deputy Tax Collector)

County of

(1975, c. 881, s. 1; 1977, 2nd Sess., c. 1187, s. 1.)

Editor's Note. — "TAX PERMIT" for "MOVING PERMIT" at the beginning of the form.
The 1977, 2nd Sess., amendment substituted

§ 105-316.6. Penalties for violations. — (a) Any person required by this Article to obtain a tax permit who fails to do so or who fails to properly display same shall be guilty of a misdemeanor and, upon conviction, shall be subject to a fine not to exceed two hundred fifty dollars (\$250.00) or imprisonment not to exceed 30 days, or both, in the discretion of the court. This penalty shall be in addition to any penalties imposed for failure to list property for taxation and interest for failure to pay taxes provided by the general laws of this State.

(b) Any manufacturer or retailer of mobile homes who aids or abets any owner covered by this Article to defeat in any manner the purpose of the Article shall be guilty of a misdemeanor and, upon conviction, shall be subject to a fine not to exceed two hundred fifty dollars (\$250.00) or imprisonment not to exceed 30 days, or both, in the discretion of the court.

(c) Any person who transports a mobile home from a location in this State for an owner other than a manufacturer or retailer of mobile homes without having properly displayed thereon the tax permit required by this Article shall be guilty of a misdemeanor and, upon conviction, shall be subject to a fine not to exceed two hundred fifty dollars (\$250.00) or imprisonment not to exceed 30 days, or both, in the discretion of the court.

(d) Any law-enforcement officer of this State who apprehends any person violating the provisions of this Article shall detain such person and mobile home until satisfactory arrangements have been made to meet the requirements of this Article. (1975, c. 881, s. 1; 1977, 2nd Sess., c. 1187, ss. 1, 4, 5.)

Editor's Note. — of subsection (c), substituted "two hundred fifty dollars (\$250.00)" for "fifty dollars (\$50.00)" in subsections (a), (b) and (c) and inserted "and mobile home" in subsection (d).
The 1977, 2nd Sess., amendment substituted "tax permit" for "moving permit" in the first sentence of subsection (a) and near the middle

ARTICLE 21.

Review and Appeals of Listings and Valuations.

§ 105-322. County board of equalization and review.

Editor's Note. — discovery of property unlisted for purposes of ad valorem taxation, see 51 N.C.L. Rev. 531 (1973).
For note on procedural developments in the

§ 105-323. Giving effect to decisions of the board of equalization and review.

Editor's Note. — For note on procedural developments in the discovery of property unlisted for purposes of ad valorem taxation, see 51 N.C.L. Rev. 531 (1973).

§ 105-325. Powers of board of county commissioners to change abstracts and tax records after board of equalization and review has adjourned.

Editor's Note. —

For note on procedural developments in the

discovery of property unlisted for purposes of ad valorem taxation, see 51 N.C.L. Rev. 531 (1973).

ARTICLE 22.

*Listing, Appraising, and Assessing by
Cities and Towns.*

§ 105-327. Appraisal and assessment of property subject to city and town taxation.

Editor's Note. —

For note on procedural developments in the

discovery of property unlisted for purposes of ad valorem taxation, see 51 N.C.L. Rev. 531 (1973).

ARTICLE 25.

Levy of Taxes and Presumption of Notice.

§ 105-348. All interested persons charged with notice of taxes.

Cited in *Henderson County v. Osteen*, 292 N.C. 692, 235 S.E.2d 166 (1977).

ARTICLE 26.

Collection and Foreclosure of Taxes.

§ 105-369. Sale of tax liens on real property for failure to pay taxes.

Cited in *Henderson County v. Osteen*, 292 N.C. 692, 235 S.E.2d 166 (1977).

§ 105-374. Foreclosure of tax lien by action in nature of action to foreclose a mortgage.

Sale with No Other Notice Than Posting and Publication Offends Due Process. — Where the statutory alternative to foreclosure by court action as prescribed in § 105-391 (now this section), is a sale without any notice except by

posting and publication, the statutory alternative offends the fundamental concept of due process of law. *Henderson County v. Osteen*, 292 N.C. 692, 235 S.E.2d 166 (1977).

§ 105-375. In rem method of foreclosure.

Due Process Satisfied. —

When notice of the execution sale is sent by registered or certified mail to the listing taxpayer at his last known address, as is required by § 105-392 (now this section), such notice, in conjunction with the posting and publication also required by the statute, would be sufficient to satisfy the fundamental concept

of due process of law and therefore, to comply with North Carolina Const., Art. I, § 19, and the due process clause of the Fourteenth Amendment of the federal Constitution. *Henderson County v. Osteen*, 292 N.C. 692, 235 S.E.2d 166 (1977).

Notices Indispensable to Valid Sale. — The giving of the notices of the docketing of the

judgment and of the sale under execution, required by § 105-392 (now this section), is indispensable to a valid sale under that statute and the provision of § 105-397.1 (now § 105-394), to the contrary, is in conflict with North Carolina Const., Art. I, § 19. *Henderson County v. Osteen*, 292 N.C. 692, 235 S.E.2d 166 (1977).

Foreclosure under This Section Is Exception to General Rule. — Foreclosure of a tax lien by judgment and execution, pursuant to former § 105-392 (now this section), is an exception to the general rule that land may not be sold under an execution issued after the death of the judgment debtor. *Henderson County v. Osteen*, 292 N.C. 692, 235 S.E.2d 166 (1977).

When Taxpayer Dies. —

When a county which has purchased a tax lien

at a valid sale thereof and which, after notice to the listing taxpayer, has docketed a judgment and issued execution in accordance with the procedures prescribed in § 105-392 (now this section), the county may not, after the death of the taxpayer, without mailing to his last known address by registered or certified mail, as specified in the statute, sell his land, at a sale otherwise held in conformity to the statute, and convey a valid title to the purchaser for the reason that the provision of § 105-397.1 (now § 105-394) declaring the failure so to mail the prescribed notice to the listing taxpayer a mere irregularity, not affecting the validity of the deed, is unconstitutional. *Henderson County v. Osteen*, 292 N.C. 692, 235 S.E.2d 166 (1977).

§ 105-377. Time for contesting validity of tax foreclosure title.

Motion to Set Aside Tax Sale Held Not Barred by This Section. — A judgment having been entered in favor of a county against the defendants for ad valorem taxes, and the land in question having been sold and conveyed pursuant to an execution, a motion properly filed by the defendants in the cause seeking to set aside the tax sale was not barred by § 105-393

(the predecessor to this section) since the motion in the cause was not an action or proceeding brought to contest the validity of a title to real property, nor a motion to reopen or set aside the judgment pursuant to which the tax sale was held. *Henderson County v. Osteen*, 292 N.C. 692, 235 S.E.2d 166 (1977).

ARTICLE 30.

General Provisions.

§ 105-394. Immaterial irregularities.

Constitutionality of Notice Provisions. — The giving of the notices of the docketing of the judgment and of the sale under execution, required by § 105-392 (now § 105-375), is indispensable to a valid sale under that statute and the provision of § 105-397.1 (now this section), to the contrary, is in conflict with North Carolina Const., Art. I, § 19. *Henderson County v. Osteen*, 292 N.C. 692, 235 S.E.2d 166 (1977).

When a county which has purchased a tax lien at a valid sale thereof and which, after notice to the listing taxpayer, has docketed a judgment and issued execution in accordance with the procedures prescribed in § 105-392 (now § 105-375), the county may not, after the death of the taxpayer, without mailing to his last known address by registered or certified mail, as specified in the statute, sell his land, at a sale otherwise held in conformity to the statute, and convey a valid title to the purchaser for the reason that the provision of § 105-397.1 (now

this section) declaring the failure so to mail the prescribed notice to the listing taxpayer a mere irregularity, not affecting the validity of the deed, is unconstitutional. *Henderson County v. Osteen*, 292 N.C. 692, 235 S.E.2d 166 (1977).

Section Not Limited to Procedures Incident to Sale of Tax Liens. — Former § 105-397.1 was originally a subparagraph in the section entitled "Sales of Tax Liens on Real Property for Failure to Pay Taxes." § 105-387(j). The legislature of 1965 took this provision out of that section and with minor modifications, made it a separate section in Article 28 (now Article 30) of Chapter 105 of the General Statutes. This would indicate a legislative intent to free this provision from any possible limitation of it to procedures incident to the sale of tax liens so as to extend it to procedures for foreclosure thereof as well. *Henderson County v. Osteen*, 292 N.C. 692, 235 S.E.2d 166 (1977).

§ 105-395. Application and effective date of Subchapter.

Editor's Note. — For survey of 1976 case law on taxation, see 55 N.C.L. Rev. 1083 (1977).

SUBCHAPTER V. GASOLINE TAX.

ARTICLE 36.

Gasoline Tax.

§ 105-446.3. **Refund of taxes paid on motor fuels used in operation of motor buses transporting fare-paying passengers in a city transit system, in operation of a taxicab transporting farepaying passengers, and in operation of private nonprofit transportation services.** — (a) Any person, association, firm or corporation, who shall purchase any motor fuels, as defined in this Article, for the purpose of use, and the same is actually used, in the operation of motor buses transporting fare-paying passengers, in connection with a city transit system or in the operation of a taxicab transporting fare-paying passengers, both as hereinafter defined in subsection (b) of this section, or in the operation, by private nonprofit organizations, of motor vehicles transporting passengers under contract with or at the express designation of units of local government (such transportation above and hereinafter referred to as private nonprofit transportation services) shall be entitled to be reimbursed at the rate of eight cents (8¢) per gallon of tax levied by this Article upon filing with the Secretary of Revenue an application upon the oath or affirmation of the applicant or his agent showing the number of gallons of motor fuel so purchased and used. All claims for refunds of taxes under the provisions of this section shall be filed with the Secretary of Revenue on forms to be prescribed by him, on or before the last day of January, April, July and October of each year, and shall cover only the motor fuels so used during the quarterly period immediately preceding the month in which such application is filed. Refunds made pursuant to claims filed after the dates above specified shall be subject to the following late filing penalties: claims filed within 30 days after said dates, twenty-five percent (25%); claims filed after 30 days but within six months after said dates, fifty percent (50%); but refunds claimed after six months following said dates shall be barred.

(b) For the purposes of this section the term "city transit system" means a system of mass public transportation authorized to operate within any municipality or within contiguous municipalities and within a zone adjacent to and commercially a part of such municipality or contiguous municipalities as defined by the North Carolina Utilities Commission under the provisions of G.S. 62-260. Any person, association, firm or corporation, who, in addition to the operation of a city transit system as herein defined, holds a certificate from the North Carolina Utilities Commission for operations outside of the municipal limits and adjacent commercial zones or who conducts exempt operations outside of the municipal limits or adjacent commercial zones shall be entitled to the refund provided by this section only on taxes levied upon motor fuels actually used in the operation of the city transit system. For the purposes of this section the term "taxicab" shall mean a taxicab as defined in G.S. 20-87(3); provided, however, that a city transit system as defined herein shall not include limousine operations.

(d) If, upon the filing of such application, the Secretary of Revenue shall be satisfied that the same is made in good faith and that the motor fuels upon which said tax refund is requested have been or are to be used exclusively for purposes as set forth in said application and for the operation of a city transit system or for the operation of a taxicab transporting fare-paying passengers or for private nonprofit transportation services, he shall issue to such applicant a warrant upon the State Treasurer for the tax refund.

"(e) If the Secretary of Revenue shall be satisfied that the applicant for any

refund authorized by this section has collected or sought to collect any refund of tax or taxes on fuels not used in the operation of a city transit system or in the operation of a taxicab transporting fare-paying passengers or for private nonprofit transportation services, he shall issue to such applicant notice to show cause why such application should not be disallowed, which notice shall state a time and place of hearing upon said notice. If upon such hearing the Secretary shall find as a fact that such applicant has collected or sought to collect any refund on fuels which have not been used in the operation of a city transit system or in the operation of a taxicab transporting fare-paying passengers or for private nonprofit transportation services, he shall disallow the application in its entirety and the applicant shall be required to repay all tax or taxes which have been refunded to him on said application.

(1977, 2nd Sess., c. 1215.)

Editor's Note. —

The 1977, 2nd Sess., amendment, effective July 1, 1978, amended subsections (a), (b), (d) and (e) so as to make this section applicable to the operation of taxicabs transporting fare-paying

passengers and to private nonprofit transportation services.

Only the subsections changed by the amendment are set out.

Chapter 106.

Agriculture.

ARTICLE 31.

North Carolina Seed Law.

§ 106-277.9. Prohibitions.

Editor's Note. — For note on strict liability for breach of warranty, see 50 N.C.L. Rev. 697 (1972).

ARTICLE 38.

Marketing Cotton and Other Agricultural Commodities.

§ 106-435. Fund for support of system; collection and investment.

Purpose of Fund. — The General Assembly, when by this section it created the State Indemnifying and Guaranty Fund to safeguard the State warehouse system and to make its receipts acceptable as collateral, did not intend that it should encourage individuals or financial institutions to engage in transactions from which they would otherwise have recoiled. On

the contrary, the fund was created to protect those parties to or purchasers of warehouse receipts who, acting in good faith and without reason to know that the goods described thereon are misdescribed or nonexistent, suffer loss through their acceptance or purchase of the receipt. *Branch Banking & Trust Co. v. Gill*, 293 N.C. 164, 237 S.E.2d 21 (1977).

ARTICLE 50.

Promotion of Use and Sale of Agricultural Products.

§ 106-550. Policy as to promotion of use of, and markets for, farm products; tobacco excluded.

Editor's Note. — For note questioning the validity of this article as being an unconstitutional delegation of

legislative power, see 8 N.C. Central L.J. 300 (1977).

Chapter 108. Social Services.

Article 1.

Administration.

Part 3. County Boards of Social Services.

Sec.

108-7. Creation.

108-15. Duties and responsibilities.

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108-19. Duties and responsibilities.

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108-45. Confidentiality of records.

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Fund.

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Part 6. State-County Special Assistance for Adults.

108-62. Purpose and eligibility.

108-65. Participation.

Article 4A.

Protection of the Abused, Neglected, or Exploited Disabled Adult Act.

108-106.2. Provision of protective services to
disabled adults who lack the
capacity to consent; hearing
findings, etc.

ARTICLE 1.

Administration.

Part 3. County Boards of Social Services.

§ 108-7. Creation. — Every county shall have a board of social services which shall establish county policies for the programs established by this Chapter in conformity with the rules and regulations of the Social Services Commission and under the supervision of the Department of Human Resources. Provided, however, county policies for the program of medical assistance shall be established in conformity with the rules and regulations of the Department of Human Resources. (1917, c. 170, s. 1; 1919, c. 46, s. 3; C. S., s. 5014; 1937, c. 319, s. 3; 1941, c. 270, s. 2; 1945, c. 47; 1953, c. 132; 1955, c. 249; 1957, c. 100, s. 1; 1959, c. 1255, s. 1; 1961, c. 186; 1963, c. 139; c. 247, ss. 1, 2; 1969, c. 546, s. 1; 1973, c. 476, s. 138; 1977, 2nd Sess., c. 1219, s. 6.)

Editor's Note. — The 1977, 2nd Sess., amendment, effective July 1, 1978, added the second sentence.

Session Laws 1977, 2nd Sess., c. 1219, s. 57 contains a severability clause.

§ 108-15. Duties and responsibilities. — The county board of social services shall have the following duties and responsibilities:

- (5) To have such other duties and responsibilities as the General Assembly, the Department of Human Resources or the Social Services Commission or the board of county commissioners may assign to it. (1917, c. 170, s. 1; 1919, c. 46, s. 3; C. S., s. 5014; 1937, c. 319, s. 3; 1941, c. 270, s. 2; 1945, c. 47; 1953, c. 132; 1955, c. 249; 1957, c. 100, s. 1; 1959, c. 1255, s. 1; 1961, c. 186; 1963, c. 139; c. 247, ss. 1, 2; 1969, c. 546, s. 1; 1973, c. 476, s. 138; 1977, 2nd Sess., c. 1219, s. 7.)

Editor's Note. — The 1977, 2nd Sess., amendment, effective July 1, 1978, inserted "the Department of Human Resources" in subdivision (5).

Session Laws 1977, 2nd Sess., c. 1219, s. 57, contains a severability clause.

As the rest of the section was not changed by the amendment, only the introductory language and subdivision (5) are set out.

Part 4. County Director of Social Services.

§ 108-19. Duties and responsibilities. — The director of social services shall have the following duties and responsibilities:

- (3) To administer the programs of public assistance established by this Chapter under pertinent rules and regulations. (1977, 2nd Sess., c. 1219, s. 8.)

Editor's Note. — The 1977, 2nd Sess., amendment, effective July 1, 1978, added "under pertinent rules and regulations" at the end of subdivision (3).

Session Laws 1977, 2nd Sess., c. 1219, s. 57, contains a severability clause.

As the rest of the section was not changed by the amendment, only the introductory language and subdivision (3) are set out.

ARTICLE 2.

Programs of Public Assistance.

§ 108-23. Creation of programs. — (a) The following programs of public assistance are hereby established, and shall be administered by the county departments of social services under rules and regulations adopted by the Social Services Commission and under the supervision of the Department of Human Resources:

- (1) Aid to the aged and disabled;
- (2) Aid to families with dependent children;
- (3) State-county special assistance for adults;
- (4) Repealed by Session Laws 1977, 2nd Sess., c. 1219, s. 9, effective July 1, 1978.
- (5) Foster home fund.

(b) The program of medical assistance is hereby established and shall be administered by the county departments of social services under rules and regulations adopted by the Department of Human Resources. (1937, c. 135, s. 1; c. 288, ss. 3, 31; 1949, c. 1038, s. 2; 1955, c. 1044, s. 1; 1957, c. 100, s. 1; 1965, c. 1173, s. 1; 1969, c. 546, s. 1; 1973, c. 476, s. 138; 1975, c. 92, s. 4; 1977, 2nd Sess., c. 1219, s. 9.)

Editor's Note. —

The 1977, 2nd Sess., amendment, effective

July 1, 1978, designated the former provisions of this section as subsection (a), repealed

subdivision (4) of subsection (a), which read "Medical assistance; and" and added subsection (b).

Session Laws 1977, 2nd Sess., c. 1219, s. 57, contains a severability clause.

Cited in *Vaughn v. Durham County Dep't of Social Servs.*, 34 N.C. App. 416, 240 S.E.2d 456 (1977).

§ 108-24. Definitions. — As used in Article 2:

(4) "Medical assistance" is any program of medical, dental, optometric or other health-related services approved by the Department of Human Resources.

(1977, 2nd Sess., c. 1219, s. 10.)

Editor's Note. —

The 1977, 2nd Sess., amendment, effective July 1, 1978, substituted "Department of Human Resources" for "Social Services Commission" at the end of subdivision (4).

Session Laws 1977, 2nd Sess., c. 1219, s. 57, contains a severability clause.

As the rest of the section was not changed by the amendment, only the introductory language and subdivision (4) are set out.

Part 1. Aid to the Aged and Disabled.

§ 108-27. Direct payments for nursing and custodial care. — (a) The Department of Human Resources is authorized and empowered to make payments to duly licensed nursing homes or extended care facilities for persons eligible to receive assistance to the aged and disabled when nursing care is found to be essential for such persons by the Department of Human Resources under the pertinent rules and regulations.

(b) The Department of Human Resources is authorized and empowered to make payments to family care homes, homes for the aged and intermediate care homes for persons eligible to receive assistance to the aged and disabled when such facilities are found to be essential for such persons by a county department of social services under the pertinent rules and regulations.

(1977, 2nd Sess., c. 1219, s. 11.)

Editor's Note. — The 1977, 2nd Sess., amendment, effective July 1, 1978, inserted "pertinent" near the end of subsections (a) and (b) and deleted "of the Social Services Commission" at the end of subsections (a) and (b).

Session Laws 1977, 2nd Sess., c. 1219, s. 57, contains a severability clause.

As subsection (c) was not changed by the amendment, it is not set out.

Part 2. Aid to Families with Dependent Children.

§ 108-38. Eligibility requirements; certain contributions to be disregarded.

Editor's Note. —

For article reviewing the development of

protective services for children in this state, see 54 N.C.L. Rev. 743 (1976).

Part 3. The Administration of Aid to the Aged and Disabled and Aid to Families with Dependent Children.

§ 108-42. Granting or denial of assistance.

(c) The board of county commissioners may review any grant approved by the county board of social services. The recipient of a disputed grant shall receive notice of the time and place of such review. If the board of commissioners deems that a grant was improperly allowed under the policies of the Social Services Commission or the Department of Human Resources in the case of medical assistance, it may order that proper action be taken, with notice thereof given to the recipient and a copy to the county board of social services and the

Secretary of Human Resources. Any modification made by the board of county commissioners shall be subject to review by the Secretary of Human Resources.

(d) All rules and regulations of the Social Services Commission or the Department of Human Resources in the case of medical assistance, which govern eligibility for public assistance from State appropriations or the amount of public assistance grants shall be subject to the approval of the Director of the Budget and the Advisory Budget Commission. (1937, c. 288, ss. 15, 16, 45, 46; 1939, c. 395, s. 1; 1941, c. 232; 1945, c. 615, s. 1; 1947, c. 91, s. 3; 1953, c. 675, s. 12; 1959, c. 179, ss. 1, 2; 1969, c. 546, s. 1; 1971, c. 523, s. 1; 1973, c. 476, s. 138; 1977, 2nd Sess., c. 1219, s. 12.)

Editor's Note. — The 1977, 2nd Sess., amendment, effective July 1, 1978, inserted "or the Department of Human Resources in the case of medical assistance" in the third sentence of subsection (c) and in subsection (d).

Session Laws 1977, 2nd Sess., c. 1219, s. 57, contains a severability clause.

As subsections (a) and (b) were not changed by the amendment, they are not set out.

§ 108-43. Reconsideration of grants. — All grants of public assistance shall be considered as frequently as required by the rules of the Social Services Commission or the Department of Human Resources in the case of medical assistance. Whenever the condition of any recipient has changed to the extent that his award must be modified or terminated, the county director may make the appropriate termination or change in payment and submit it to the county board of social services for approval at its next meeting. Prompt notice of all changes shall be given to the recipient, to the Department of Human Resources, and to the board of county commissioners. (1937, c. 288, ss. 19, 49; 1969, c. 546, s. 1; 1971, c. 523, s. 2; 1973, c. 476, s. 138; 1977, 2nd Sess., c. 1219, s. 13.)

Editor's Note. — The 1977, 2nd Sess., amendment, effective July 1, 1978, added at the end of the first sentence "or the Department of Human Resources in the case of medical assistance."

Session Laws 1977, 2nd Sess., c. 1219, s. 57, contains a severability clause.

§ 108-44. Appeals. — (a) A public assistance applicant or recipient shall have a right to appeal the decision of the county board of social services or the board of county commissioners granting or denying assistance, or modifying the amount of assistance, or the failure of the county board of social services to act within a reasonable time under the rules and regulations of the Social Services Commission or the Department of Human Resources, to the Secretary of Human Resources. Each applicant or recipient shall be notified of this right to appeal when applying for assistance and upon any subsequent action of the county board on his case. An applicant or recipient may give notice of appeal by written notice to the county department of social services or through verbal notice to personnel employed by said county department.

(b) If there is such an appeal, the county director shall notify the Department of Human Resources according to the pertinent rules and regulations and the Department of Human Resources shall designate a hearing officer who shall promptly hold an appeal hearing in the county after giving reasonable notice of the time and place of such hearing to the appellant and the county department of social services.

(d) The Secretary of Human Resources shall make a decision on such appeal in conformity with federal and State law and the rules and regulations of the Social Services Commission or the Department of Human Resources. The Secretary shall notify the appellant and the county board of social services of his decision in writing by mail. The decision of the Secretary on such an appeal shall be binding upon the county board of social services and the board of county

commissioners unless there is a petition for court review as provided in (e) herein.

(e) Any appellant or county board of social services who is dissatisfied with the decision of the Secretary may file a petition within 30 days after receipt of written notice of such decision for a hearing in the Superior Court of Wake County or of the county from which the case arose. Such court shall set the matter for a hearing within 30 days after receipt of such petition and after reasonable written notice to the Department of Human Resources, the county board of social services, the board of county commissioners, and the appellant. The court may take testimony and examine into the facts of the case to determine whether the appellant is entitled to public assistance under federal and State law, and under the rules and regulations of the Social Services Commission or the Department of Human Resources. The court may affirm, reverse or modify the order of the Secretary.

(f) If and when any federal law or regulation requires, as a condition of federal participation in public assistance payments, that public assistance applicants or recipients be furnished with the services of attorneys for the purpose of appeals described in this section or for the purpose of litigation arising out of such appeals, the services of attorneys shall be provided as required by the federal law or regulation, to the extent that funds are made available as hereinafter provided, in accordance with rules and regulations approved by the Governor, the Advisory Budget Commission, the Social Services Commission, the Department of Human Resources and the North Carolina State Bar Council. To the extent permitted by the rules and regulations thus approved, payment for the services of attorneys shall be made by the Department of Human Resources from funds transferred from contingency and emergency appropriations until such time as funds are appropriated for the services of attorneys.

(1977, 2nd Sess., c. 1219, ss. 14-18.)

Editor's Note. — The 1977, 2nd Sess., amendment, effective July 1, 1978, inserted "or the Department of Human Resources" near the end of the first sentence of subsection (a), inserted "pertinent" near the beginning of subsection (b) and deleted "of the Social Services Commission" following "regulations" near the beginning of subsection (b), added "or the Department of Human Resources" at the end of

the first sentence of subsection (d) and at the end of the third sentence of subsection (e) and inserted "the Department of Human Resources" near the end of the first sentence of subsection (f).

Session Laws 1977, 2nd Sess., c. 1219, s. 57, contains a severability clause.

As subsections (c) and (g) were not changed by the amendment, they are not set out.

§ 108-45. Confidentiality of records. — (a) Except as provided in (b) below, it shall be unlawful for any person to obtain, disclose or use, or to authorize, permit, or acquiesce in the use of any list of names or other information concerning persons applying for or receiving public assistance that may be directly or indirectly derived from the records, files or communications of the Department of Human Resources or the county boards of social services, or acquired in the course of performing official duties except for purposes directly connected with the administration of the programs of public assistance in accordance with the rules and regulations of the Social Services Commission or the Department of Human Resources.

(1977, 2nd Sess., c. 1219, s. 19.)

Editor's Note. — The 1977, 2nd Sess., amendment, effective July 1, 1978, added "or the Department of Human Resources" at the end of subsection (a).

Session Laws 1977, 2nd Sess., c. 1219, s. 57, contains a severability clause.

As subsections (b) and (c) were not changed by the amendment, they are not set out.

§ 108-50. Protective and vendor payments. — Instead of the use of personal representatives provided for by G.S. 108-49, when necessary to comply with any

present or future federal law or regulation in order to obtain federal participation in public assistance payments, the payments may be made direct to vendors to reimburse them for goods and services provided the applicants or recipients, and may be made to protective payees who shall act for the applicant or recipient for receiving and managing assistance. Payments to vendors and protective payees shall be made to the extent provided in, and in accordance with, rules and regulations of the Social Services Commission or the Department of Human Resources, which rules and regulations shall be subject to applicable federal laws and regulations. (1963, c. 380; 1969, c. 546, s. 1; c. 747; 1973, c. 476, s. 138; 1977, 2nd Sess., c. 1219, s. 20.)

Editor's Note. — The 1977, 2nd Sess., amendment, effective July 1, 1978, inserted "or the Department of Human Resources" in the second sentence.

Session Laws 1977, 2nd Sess., c. 1219, s. 57, contains a severability clause.

Part 4. Financing Aid to the Aged and Disabled and Aid to Families with Dependent Children.

§ 108-54. Determination of State and county financial participation. — Before March 15 of each year the director of social services for every county shall compile and submit to the county board of social services an estimated budget of total county funds required to finance each program of public assistance, including all administrative expenses, within the county in the next fiscal year on forms furnished by the Department of Human Resources. The county board of social services shall review, modify, and approve such estimated budget and transmit it before April 1 to the board of county commissioners, which shall review, modify and approve it before April 15 for transmittal by said date to the Department of Human Resources. The Department of Human Resources shall review the estimated budget submitted by each county and shall notify the board of county commissioners by June 1 of the approval or disapproval of the county's estimated budget of total county funds necessary to support and administer adequate programs of public assistance.

If the Department of Human Resources approves the estimated budget submitted by the county, and if administrative and program expenditures for that year in the county's aid to families with dependent children, medical assistance, State-county special assistance for adults, WIN single administrative Unit, WIN day care, and State boarding home fund for foster care programs exceed the approved estimate of administrative and program costs for said programs, or if the administrative expenditures for that year in the county's food stamp program exceed the approved estimate of administrative costs for said program, then the county shall be eligible to borrow the required additional county share from the "State Public Assistance Contingency Fund" established in G.S. 108-54.1.

If the Department of Human Resources disapproves the estimated budget of the county, it shall recommend an appropriate budget of total county funds necessary to sustain and administer adequate programs of public assistance whose acceptance by the board of county commissioners shall be a condition precedent to borrowing any moneys from the "State Public Assistance Contingency Fund" established in G.S. 108-54.1; provided that, if the board of county commissioners disputes the budget recommended by the Department of Human Resources as appropriate to sustain and administer adequate programs of public assistance within that county, the Secretary of Human Resources shall make a final determination that shall be binding upon the county.

Upon final determination of the county budget for all programs of public assistance within that county for the next fiscal year, the board of county commissioners shall levy taxes sufficient to provide for the payment of the

county's share of such budget as well as for repayment of any amount borrowed from the "State Public Assistance Contingency Fund." (1937, c. 288, ss. 9, 21, 39, 51; 1943, c. 505, s. 8; 1969, c. 546, s. 1; 1973, c. 476, s. 138; c. 1418, s. 1; 1977, c. 1089, s. 1; 1977, 2nd Sess., c. 1219, s. 21.)

Editor's Note. —

The 1977, 2nd Sess., amendment, effective July 1, 1978, substituted "Department of Human Resources" for "Director of the Division of Social Services, as agent for the Department of Human Resources," in the third sentence of the first paragraph and for "Director of the Division of Social Services" near the beginning

of the second paragraph and in two places in the third paragraph. The amendment also substituted "it" for "he" preceding "shall recommend" near the beginning of the third paragraph.

Session Laws 1977, 2nd Sess., c. 1219, s. 57, contains a severability clause.

§ 108-54.1. State Public Assistance Contingency Fund.

(b) Loans shall be made to the counties at any time during the fiscal year by the Department of Human Resources, when satisfied of the county's need for such loan under this Part.

(1977, 2nd Sess., c. 1219, s. 22.)

Editor's Note. —

The 1977, 2nd Sess., amendment, effective July 1, 1978, substituted "Department of Human Resources" for "Director of the Division of Social Services, as agent for the Department of Human Resources," in subsection (b).

Session Laws 1977, 2nd Sess., c. 1219, s. 57, contains a severability clause.

As the rest of the section was not changed by the amendment, only subsection (b) is set out.

§ 108-56. Counties to levy taxes. — (a) Whenever the Secretary of Human Resources or his representative assigns a portion of the nonfederal share of public assistance expenses to the counties under the rules and regulations of the Social Services Commission or the Department of Human Resources, the board of commissioners of each county shall levy and collect the taxes required to meet the county's share of such expenses.

(1977, 2nd Sess., c. 1219, s. 23.)

Editor's Note. —

The 1977, 2nd Sess., amendment, effective July 1, 1978, inserted "or the Department of Human Resources" in subsection (a).

Session Laws 1977, 2nd Sess., c. 1219, s. 57, contains a severability clause.

As subsection (b) was not changed by the amendment, it is not set out.

Part 5. Medical Assistance.

§ 108-59. State fund created. — To provide for an effective medical assistance program and its administration in North Carolina, the Department of Human Resources is authorized and empowered to establish from federal, State and county appropriations a fund to be known as the State Fund for Medical Assistance, and to adopt rules and regulations under which payments are to be made out of such fund in accordance with the provisions of this Part. The nonfederal share may be divided between the State and the counties, in a manner consistent with the provisions of the federal Social Security Act, except that the share required from the counties may not exceed the share required from the State. If a portion of the nonfederal share is required from the counties, the boards of county commissioners of the several counties shall levy, impose and collect the taxes required for the special purpose of medical assistance as provided in this Part, in an amount sufficient to cover each county's share of such assistance. (1965, c. 1173, s. 1; 1969, c. 546, s. 1; 1973, c. 476, s. 138; 1977, 2nd Sess., c. 1219, s. 24.)

Editor's Note. — The 1977, 2nd Sess., amendment, effective July 1, 1978, substituted "Department of Human Resources" for "Social Services Commission" in the first sentence.

Session Laws 1977, 2nd Sess., c. 1219, s. 57, contains a severability clause.

§ 108-60. Payments from fund. — From the fund established in G.S. 108-59, the Department of Human Resources may authorize, within appropriations made for this purpose, payments of all or part of the cost of medical and other remedial care for any eligible person when it is essential to the health and welfare of such person that such care be provided, and when the total resources of such person are not sufficient to provide the necessary care. Payments from the fund shall be made only to intermediate care facilities, hospitals and nursing homes licensed and approved under the laws of the State of North Carolina or under the laws of another state, or to pharmacies, physicians, dentists, optometrists or other providers of health-related services authorized by the Department of Human Resources. Payments may also be made from the fund to such fiscal intermediaries and to such prepaid health service contractors as may be authorized by the Department of Human Resources. (1965, c. 1173, s. 1; 1969, c. 546, s. 1; 1971, c. 435; 1973, c. 476, s. 138; c. 644; 1975, c. 123, ss. 1, 2; 1977, 2nd Sess., c. 1219, c. 25.)

Editor's Note. —

The 1977, 2nd Sess., amendment, effective July 1, 1978, substituted "Department of Human Resources" for "Social Services Commission" in three places.

Session Laws 1975, c. 123, s. 4, as amended by Session Laws 1977, c. 537, s. 1, was again

amended by Session Laws 1977, 2nd Sess., c. 1219, s. 5, effective July 1, 1978, so as to delete the provision for expiration of the 1975 amendment to this section on December 31, 1979.

Session Laws 1977, 2nd Sess., c. 1219, s. 57, contains a severability clause.

Part 6. State-County Special Assistance for Adults.

§ 108-62. Purpose and eligibility. — Assistance shall be granted under this Part to all persons in domiciliary care needing supplemental payments in accordance with the rules and regulations adopted by the Social Services Commission. Assistance may be granted to certain disabled persons in accordance with the rules and regulations adopted by the Social Services Commission. Nothing in this Part should be interpreted so as to preclude any individual county from operating any program of financial assistance using only county funds. (1949, c. 1038, s. 2; 1961, c. 186; 1969, c. 546, s. 1; 1973, c. 717, s. 1; 1977, 2nd Sess., c. 1252, s. 1.)

Editor's Note. — The 1977, 2nd Sess., amendment, effective July 1, 1978, rewrote the first sentence and added the second sentence.

§ 108-65. Participation. — The State-county special assistance for adults program established by this Part shall be administered by all the county departments of social services under rules and regulations adopted by the Social Services Commission and under the supervision of the Department of Human Resources. Provided that, assistance for certain disabled persons shall be provided solely at the option of the county. (1949, c. 1038, s. 2; 1969, c. 546, s. 1; 1973, c. 476, s. 138; c. 717, s. 6; 1975, c. 92, s. 3; 1977, 2nd Sess., c. 1252, s. 2.)

Editor's Note. —

The 1977, 2nd Sess., amendment, effective

July 1, 1978, rewrote the first sentence and added the second sentence.

Part 7. Foster Home Fund.

§ 108-66. State Foster Home Fund.

Stated in *Vaughn v. Durham County Dep't of Social Servs.*, 34 N.C. App. 416, 240 S.E.2d 456 (1977).

ARTICLE 4A.

Protection of the Abused, Neglected, or Exploited Disabled Adult Act.

§ 108-106.2. Provision of protective services to disabled adults who lack the capacity to consent; hearing, findings, etc.

(c) If, at the hearing, the judge finds by clear, cogent, and convincing evidence that the disabled adult is in need of protective services and lacks capacity to consent to protective services, he may issue an order authorizing the provision of protective services. This order may include the designation of an individual or organization to be responsible for the performing or obtaining of essential services on behalf of the disabled adult or otherwise consenting to protective services in his behalf. Within 60 days from the appointment of such an individual or organization, the court will conduct a review to determine if a petition should be initiated in accordance with G.S. 33-7 or, if applicable, Article 1A, Chapter 35. No disabled adult may be committed to a mental health facility under this Article. (1973, c. 1378, s. 1; 1975, c. 797; 1977, c. 725, s. 3.)

Editor's Note. —

Subsection (c) of this section is set out to correct an error in the 1978 replacement volume.

As the rest of the section was not affected, only subsection (c) is set out.

Chapter 110. Child Welfare.

Article 9. Child Support.

Sec.	Sec.
110-128. Purposes.	acknowledgments, agreements and orders; fees.
110-129. Definitions.	110-135. Debt to State created.
110-130. Action by the designated representatives of the county commissioners.	110-136. Garnishment for enforcement of child-support obligation.
110-132. Acknowledgment of paternity and agreement to support.	110-137. Acceptance of public assistance constitutes assignment of support rights to the State or county.
110-133. Agreements of support.	110-138. Duty of county to obtain support.
110-134. Filing of affirmations,	110-139. Location of absent parents.
	110-141. Effectuation of intent of Article.

ARTICLE 8.

Child Abuse and Neglect.

§ 110-115. Short title.

Editor's Note. — For article reviewing the development of protective services for children in this state, see 54 N.C.L. Rev. 743 (1976).

For note discussing the applicability of this

article to civilian dependents of Army personnel inhabiting a military base over which the federal government has exclusive jurisdiction, see 8 N.C. Central L.J. 261 (1977).

ARTICLE 9.

Child Support.

§ 110-128. Purposes. — The purposes of this Article are to provide for the financial support of dependent children; to provide that public assistance paid to dependent children is a supplement to the support required to be provided by the responsible parent; to provide that the payment of public assistance creates a debt to the State; to provide that the acceptance of public assistance operates as an assignment of the right to child support; to provide for the location of absent parents; to provide for a determination that a responsible parent is able to support his children; and to provide for enforcement of the responsible parent's obligation to furnish support and to provide for the establishment and administration of a program of child support enforcement in North Carolina. (1975, c. 827, s. 1; 1977, 2nd Sess., c. 1186, s. 1.)

Editor's Note. — The 1977, 2nd Sess., amendment substituted "dependent" for "needy" preceding "children" the second time that word appears in this section, inserted "required to be" following "support" near the beginning of the section and added at the end of the section "and to provide for the establishment and administration of a program of child support enforcement in North Carolina."

This Article Provides Statutory Basis for North Carolina Child Support Enforcement Program. — See opinion of Attorney General to Jean Prewitt Bost, Supervisor, Mecklenburg-Union Counties Child Support Enforcement Unit, 47 N.C.A.G. 45 (1977).

§ 110-129. Definitions. — As used in this Article:

- (3) "Responsible parent" means the natural or adoptive parent of a dependent child who has the legal duty to support said child and includes the father of an illegitimate child.
- (4) "Program" means the Child Support Enforcement Program established

and administered pursuant to the provisions of this Article and Title IV-D of the Social Security Act.

- (5) "Designated representative" means any person or agency designated by a board of county commissioners or the Department of Human Resources to administer a program of child support enforcement for a county or region of the State. (1975, c. 827, s. 1; 1977, 2nd Sess., c. 1186, s. 2, 3.)

Editor's Note. — The 1977, 2nd Sess., amendment deleted, at the end of subdivision (3), "if paternity has been established in a judicial proceeding or if he has acknowledged paternity

in open court or by verified written statement," and added subdivisions (4) and (5).

As subdivisions (1) and (2) were not changed by the amendment, they are not set out.

§ 110-130. Action by the designated representatives of the county commissioners. — Any county interested in the paternity and/or support of a dependent child may, if the mother, custodian, or guardian of the child neglects to bring such action, institute civil or criminal proceedings against the responsible parent of the child and may take up and pursue any action commenced by the mother, custodian or guardian for the maintenance of the child, including any ancillary action to establish paternity, if she fails to prosecute to final judgment. Such action shall be undertaken by the designated representative in the county where the mother of the child resides or is found, in the county where the father resides or is found, or in the county where the child resides or is found. Any legal proceeding instituted under this section may be based upon information or belief. The parent of the child may be subpoenaed for testimony at the trial of the action to establish the paternity of and/or to obtain support for the child either instituted or taken up by the designated representative of the county commissioners. The husband-wife privilege shall not be grounds for excusing the mother or father from testifying at the trial nor shall said privilege be grounds for the exclusion of confidential communications between husband and wife. If a parent called for examination declines to answer upon the grounds that his testimony may tend to incriminate him, the court may require him to answer in which event he shall not thereafter be prosecuted for any criminal act involved in the conception of the child whose paternity is in issue and/or for whom support is sought, except for perjury committed in this testimony. (1975, c. 827, s. 1; 1977, 2nd Sess., c. 1186, s. 4.)

Editor's Note. — The 1977, 2nd Sess., amendment inserted "or criminal" near the middle of the first sentence and deleted "of the

county commissioners" following "representative" near the beginning of the second sentence.

§ 110-132. Acknowledgment of paternity and agreement to support. — (a) In lieu of or in conclusion of any legal proceeding instituted to establish paternity, the written acknowledgment of paternity executed by the putative father of the dependent child when accompanied by a written affirmation of paternity executed and sworn to by the mother of the dependent child and filed with and approved by a judge of the district court in the county where the mother of the child resides or is found, or in the county where the putative father resides or is found, or in the county where the child resides or is found shall have the same force and effect as a judgment of that court; and a written agreement to support said child by periodic payments, which may include provision for reimbursement for medical expenses incident to the pregnancy and the birth of the child, accrued maintenance and reasonable expense of prosecution of the paternity action, when acknowledged before a certifying officer or notary public or the equivalent or corresponding person of the state, territory, or foreign country where the acknowledgment is made and filed with, and approved by a judge of the district court, at any time, shall have the same force and effect,

retroactively or prospectively, in accordance with the terms of said agreement, as an order of support entered by that court, and shall be enforceable and subject to modification in the same manner as is provided by law for orders of the court in such cases. Such written affirmations, acknowledgments and agreements to support shall be sworn to, and shall be binding on the person executing the same whether he is an adult or a minor. Such mother shall not be excused from making such affirmation on the grounds that it may tend to disgrace or incriminate her; nor shall she thereafter be prosecuted for any criminal act involved in the conception of the child as to whose paternity she makes affirmation.

(b) At any time after the filing with the district court of an acknowledgment of paternity, upon the application of any interested party, the court or any judge thereof shall cause a summons signed by him or by the clerk or assistant clerk of superior court, to be issued, requiring the putative father to appear in court at a time and place named therein, to show cause, if any he has, why the court should not enter an order for the support of the child by periodic payments, which order may include provision for reimbursement for medical expenses incident to the pregnancy and the birth of the child, accrued maintenance and reasonable expense of the action under this subsection on the acknowledgment of paternity previously filed with said court. The prior judgment as to paternity shall be res judicata as to that issue and shall not be reconsidered by the court. (1975, c. 827, s. 1; 1977, 2nd Sess., c. 1186, ss. 5, 6.)

Editor's Note. — The 1977, 2nd Sess., amendment substituted "certifying officer or notary public or the equivalent or corresponding person of the state, territory, or foreign country where the acknowledgment is made" for "clerk or assistant clerk of superior court" in the first sentence of subsection (a), and, in subsection (b), deleted the former second sentence, relating to

the case of a child who upon reaching the age of eighteen years is mentally or physically incapable of self-support, and the former fourth sentence, which read "All such payments shall be made through the clerk of superior court and in those cases of dependent children receiving public assistance shall be directed to the North Carolina Department of Human Resources."

§ 110-133. Agreements of support. — In lieu of or in conclusion of any legal proceeding instituted to obtain support for a dependent child from the responsible parent, a written agreement to support said child by periodic payments executed by the responsible parent when acknowledged before a certifying officer or notary public or the equivalent or corresponding person of the state, territory or foreign country where the acknowledgment is made and filed with and approved by a judge of the district court in the county where the mother of the child resides or is found, or in the county where the father resides or is found, or in the county where the child resides or is found shall have the same force and effect, retroactively and prospectively, in accordance with the terms of said agreement, as an order of support entered by the court, and shall be enforceable and subject to modification in the same manner as is provided by law for orders of the court in such cases. (1975, c. 827, s. 1; 1977, 2nd Sess., c. 1186, s. 7.)

Editor's Note. — The 1977, 2nd Sess., amendment substituted "certifying officer or notary public or the equivalent or corresponding person of the state, territory or foreign country where the acknowledgment is made" for "clerk or assistant clerk of superior court" near the middle of the section, and deleted the former second sentence, which read "Payments under such agreement shall be made through the clerk of superior court and in those cases of dependent

children receiving public assistance shall be directed to the North Carolina Department of Human Resources."

The filing fee for a voluntary support agreement set up under this section is \$4.00. Opinion of Attorney General to Mr. J. Donald Chappell, Controller, Administrative Office of the Courts, Fiscal Management Division, 47 N.C.A.G. 93 (1977).

§ 110-134. Filing of affirmations, acknowledgments, agreements and orders; fees. — All affirmations, acknowledgments, agreements and resulting orders entered into under the provisions of G.S. 110-132 and G.S. 110-133 shall be filed by the clerk of superior court in the county in which they are entered. The filing fee for the institution of an action through the entry of an order under either of these provisions shall be four dollars (\$4.00). (1975, c. 827, s. 1; 1977, 2nd Sess., c. 1186, s. 8.)

Editor's Note. — The 1977, 2nd Sess., amendment rewrote this section.

§ 110-135. Debt to State created. — Acceptance of public assistance by or on behalf of a dependent child creates a debt, in the amount of public assistance paid, due and owing the State by the responsible parent or parents of the child. Provided, however, that in those cases in which child support was required to be paid incident to a court order during the time of receipt of public assistance, the debt shall be limited to the amount specified in such court order. This liability shall attach only to public assistance granted subsequent to June 30, 1975, and only with respect to the period of time during which public assistance is granted, and only if the responsible parent or parents were financially able to furnish support during this period.

The United States, the State of North Carolina, and any county within the State which has provided public assistance to or on behalf of a dependent child shall be entitled to share in any sum collected under this section, and their proportionate parts of such sum shall be determined in accordance with the matching formulas in use during the period for which assistance was paid.

No action to collect such debt shall be commenced after the expiration of five years subsequent to the receipt of the last grant of public assistance. The county attorney or an attorney retained by the county and/or State shall represent the State in all proceedings brought under this section. (1975, c. 827, s. 1; 1977, 2nd Sess., c. 1186, ss. 9, 10.)

Editor's Note. — The 1977, 2nd Sess., amendment rewrote the first paragraph and inserted "or an attorney retained by the county and/or State" in the second sentence of the last paragraph.

§ 110-136. Garnishment for enforcement of child-support obligation. — (a) Notwithstanding any other provision of the law, in any case in which a responsible parent is under a court order or has entered into a written agreement pursuant to G.S. 110-132 or 110-133 to provide child support, a judge of the district court in the county where the mother of the child resides or is found, or in the county where the father resides or is found, or in the county where the child resides or is found may enter an order of garnishment whereby no more than 25 percent (25%) of the responsible parent's monthly disposable earnings shall be garnished for the support of his minor child. For purposes of this section, "disposable earnings" is defined as that part of the compensation paid or payable to the responsible parent for personal services, whether denominated as wages, salary, commission, bonus, or otherwise (including periodic payments pursuant to a pension or retirement program) which remains after the deduction of any amounts required by law to be withheld. The garnishee is the person, firm, association, or corporation by whom the responsible parent is employed.

(b) The mother, father, custodian, or guardian of the child or any designated representative interested in the support of a dependent child may petition the court for an order of garnishment. The petition shall be verified and shall state that the responsible parent is under court order or has entered into a written agreement pursuant to G.S. 110-132 or 110-133 to provide child support, that said

parent is delinquent in such child support or has been erratic in making child-support payments, the name and address of the employer of the responsible parent, the responsible parent's monthly disposable earnings from said employer (which may be based upon information and belief), and the amount sought to be garnished, not to exceed 25 percent (25%) of the responsible parent's monthly disposable earnings. The petition shall be served on both the responsible parent and his alleged employer in accordance with the provisions for service of process set forth in G.S. 1A-1, Rule 4. The responsible parent and his alleged employer shall have 20 days from the date of service or 30 days from the date stated in the notice of service of process by publication to respond to the petition for garnishment.

(c) A hearing on the petition shall be held within 10 days after the time for response has elapsed or within 10 days after the responses of both the responsible parent and the garnishee have actually been filed. Following the hearing the court may enter an order of garnishment not to exceed 25 percent (25%) of the responsible parent's monthly disposable earnings. If an order of garnishment is entered, a copy of same shall be served on the responsible parent and the garnishee either personally or by registered mail, return receipt requested. The order shall set forth sufficient findings of fact to support the action by the court and the amount to be garnished for each pay period. The order shall be subject to review for modification and dissolution upon the filing of a motion in the cause.

(1977, 2nd Sess., c. 1186, ss. 11, 12.)

Editor's Note. — The 1977, 2nd Sess., amendment substituted "twenty-five percent (25%)" for "twenty percent (20%)" in the first sentence of subsection (a) and in the second sentences of subsections (b) and (c) and substituted "designated representative" for "county" in the first sentence of subsection (b).

As subsections (d) and (e) were not changed by the amendment, they are not set out.

For note on the remedy of garnishment in child support, see 56 N.C.L. Rev. 169 (1978).

Section Does Not Authorize Garnishment of Wages for Alimony. — The exception in the case of child support to the long-standing prohibition against garnishment of wages has not been extended to allow garnishment of wages for

alimony. *Phillips v. Phillips*, 34 N.C. App. 612, 239 S.E.2d 743 (1977).

This section does not alter the long-standing rule prohibiting the garnishment of prospective wages for the nonpayment of alimony and other debts. *Elmwood v. Elmwood*, 34 N.C. App. 652, 241 S.E.2d 693 (1977).

Military retirement pay is the equivalent of active duty pay for purposes of garnishment, and active duty pay clearly constitutes wages not subject to garnishment for alimony under North Carolina law. *Phillips v. Phillips*, 34 N.C. App. 612, 239 S.E.2d 743 (1977); *Elmwood v. Elmwood*, 34 N.C. App. 652, 241 S.E.2d 693 (1977).

§ 110-137. Acceptance of public assistance constitutes assignment of support rights to the State or county. — By accepting public assistance for or on behalf of a dependent child or children, the recipient shall be deemed to have made an assignment to the State or to the county from which such assistance was received of the right to any child support owed for the child or children up to the amount of public assistance paid. The State or county shall be subrogated to the right of the child or children or the person having custody to initiate a support action under this Article and to recover any payments ordered by the court of this or any other state. (1975, c. 827, s. 1; 1977, 2nd Sess., c. 1186, s. 13.)

Editor's Note. — The 1977, 2nd Sess., amendment inserted "to the State or" near the

middle of the first sentence and "State or" near the beginning of the second sentence.

§ 110-138. Duty of county to obtain support. — Whenever a county department of social services receives an application for public assistance on

behalf of a dependent child, and it shall appear to the satisfaction of the county department that the child has been abandoned by one or both responsible parents, or that the responsible parent(s) has failed to provide support for the child, the county department shall without delay notify the designated representative who shall take appropriate action under this Article to provide that the parent(s) responsible supports the child. (1975, c. 827, s. 1; 1977, 2nd Sess., c. 1186, s. 14.)

Editor's Note. — The 1977, 2nd Sess., following "representative" near the end of the amendment inserted "without delay" and section.
deleted "of the county commissioners"

§ 110-139. Location of absent parents. — The Department of Human Resources shall attempt to locate absent parents for the purpose of establishing paternity of and/or securing support for dependent children. The Department is to serve as a registry for the receipt of information which directly relates to the identity or location of absent parents, to assist any governmental agency or department in locating an absent parent, to answer interstate inquiries concerning deserting parents, and to develop guidelines for coordinating activities with any governmental department, board, commission, bureau or agency in providing information necessary for the location of absent parents.

In order to carry out the responsibilities imposed under this Article, the Department may request from any governmental department, board, commission, bureau or agency information and assistance. All State, county and city agencies, officers and employees shall cooperate with the Department in the location of parents who have abandoned and deserted children with all pertinent information relative to the location, income and property of such parents, notwithstanding any provision of law making such information confidential. All nonjudicial records maintained by the Department pertaining to child-support enforcement shall be confidential, and only duly authorized representatives of social service agencies, public officials with child-support enforcement and related duties, and members of legislative committees shall have access to these records. (1975, c. 827, s. 1; 1977, 2nd Sess., c. 1186, s. 15.)

Editor's Note. — The 1977, 2nd Sess., beginning of the last sentence of the second amendment inserted "nonjudicial" near the paragraph.

§ 110-141. Effectuation of intent of Article. — The North Carolina Department of Human Resources shall supervise the administration of this program in accordance with federal law and shall cause the provisions of this Article to be effectuated and to secure child support from absent, deserting, abandoning and nonsupporting parents.

In the event that a board of county commissioners fails to appoint a designated representative or notifies the Department of Human Resources at any time that it does not desire to continue to administer the program, it shall then become the duty of the Department of Human Resources to administer or provide for the administration of the program for said county within 30 days of such failure or notification. (1975, c. 827, s. 1; 1977, 2nd Sess., c. 1186, s. 16.)

Editor's Note. — The 1977, 2nd Sess., outlined in G.S. 110-130 for designating a local amendment deleted the former second sentence, agency to administer the provisions of this which read "The Department of Human Article in said county," and added the second Resources and a county may negotiate paragraph.
alternative arrangements to the procedure as

Chapter 113.

Conservation and Development.

SUBCHAPTER I. GENERAL PROVISIONS.

Article 1B. Aviation.

Sec.

113-28.5. Authority of Department of Transportation generally; "airport" defined.

113-28.7. Activities eligible for State aid.

113-28.8. Limitations on State financial aid.

SUBCHAPTER III. GAME LAWS.

Article 7.

North Carolina Game Law of 1935.

113-104. Manner of taking game.

Sec.

113-109. Punishment for violation of Article.

SUBCHAPTER IV. CONSERVATION OF FISHERIES RESOURCES.

Article 14.

Commercial and Sports Fisheries Licenses and Taxes.

113-161. Nonresidents reciprocal agreements.

SUBCHAPTER I. GENERAL PROVISIONS.

ARTICLE 1B.

Aviation.

§ 113-28.5. **Authority of Department of Transportation generally; "airport" defined.** — (a) The Department of Transportation is hereby authorized, subject to the limitations and conditions of this Article, to provide State aid in form of loans and grants to cities, counties, and public airport authorities of North Carolina for the purpose of planning, acquiring, constructing, or improving municipal, county, and other publicly owned or controlled airport facilities, and to authorize related programs of aviation safety, education, promotions, and long-range planning.

(1977, 2nd Sess., c. 1219, s. 39.)

Editor's Note. —

The 1977, 2nd Sess., amendment, effective July 1, 1978, substituted "or controlled" near the end of subsection (a).

Session Laws 1977, 2nd Sess., c. 1219, s. 57, contains a severability clause.

As subsection (b) was not changed by the amendment, it is not set out.

§ 113-28.7. **Activities eligible for State aid.** — Loans and grants of State funds may be made for the planning, acquisition, construction, or improvement of any airport, seaplane base, or heliport owned or controlled, or which will be owned or controlled by any city, county or public airport authority acting by itself or jointly with any other city or county. An airport, seaplane base, or heliport development project or activity eligible for State aid under this Article shall also be deemed to include projects such as air navigation facilities, aviation easements, and the acquisition of land, lighting, marking, security items, terminal improvements, and the elimination of aviation safety hazards. (1967, c. 1006, s. 1; 1973, c. 1443, s. 2; 1977, 2nd Sess., c. 1219, s. 39.1.)

Editor's Note. — The 1977, 2nd Sess., amendment, effective July 1, 1977, substituted "or" for "and" preceding "controlled by any

city" in the first sentence.

Session Laws 1977, 2nd Sess., c. 1219, s. 57, contains a severability clause.

§ 113-28.8. **Limitations on State financial aid.** — Grants and loans of funds authorized by this Article shall be subject to the following conditions and limitations:

(1) Loans and grants may be for such projects, activities, or facilities as would in general be eligible for approval by the Federal Aviation Administration or its successor agency or agencies with the exception that the requirement that the airport be publicly owned shall not be applicable. Further, airport terminal and security areas, seaplane bases, and heliports are also eligible for State financial aid.

(1977, 2nd Sess., c. 1219, s. 39.2.)

Editor's Note. —

The 1977, 2nd Sess., amendment, effective July 1, 1978, added at the end of the first sentence of subdivision (1) "with the exception that the requirement that the airport be publicly owned shall not be applicable."

Session Laws 1977, 2nd Sess., c. 1219, s. 57, contains a severability clause.

As the rest of the section was not changed by the amendment, only the introductory language and subdivision (1) are set out.

SUBCHAPTER III. GAME LAWS.

ARTICLE 7.

North Carolina Game Law of 1935.

§ 113-100. Open season.

Applied in *State v. Cole*, 294 N.C. 304, 240 S.E.2d 355 (1978).

§ 113-102. Protected and unprotected game.

Cited in *State v. Cole*, 294 N.C. 304, 240 S.E.2d 355 (1978).

§ 113-103. Unlawful possession.

Applied in *State v. Cole*, 294 N.C. 304, 240 S.E.2d 355 (1978).

§ 113-104. Manner of taking game. — No person shall at any time of the year take in any manner, number, or quantity any wild bird or wild animal, or take the nests or eggs of any wild bird, or possess, buy, sell, offer or expose for sale, or transport at any time or in any manner any such bird, animal, or part thereof, or any birds' nests or eggs, except as permitted by this Article; the possession of any game animals, or game birds or part of such animals or game birds, except those expressly permitted by the Wildlife Resources Commission, in any hotel, restaurant, cafe, market or store, or by any produce dealer in this State shall be prima facie evidence of the possession thereof for the purpose of sale in violation of the provisions of this Article; but this provision shall not be construed to prohibit the person lawfully obtaining game from having it prepared in a public eating place and served to himself and guest: Provided, however, that for the purpose of this Article any person hiring another to kill aforesaid game animals or game birds and receiving same shall be deemed buying same, and subject to the penalties of this Article. Game birds and game animals shall be taken only in the daytime, between sunrise and sunset, with a shotgun not larger than number 10 gauge, a rifle, or with bow having minimum pull of 45 pounds and nonpoisonous, nonbarbed, nonexplosive arrow with minimum broadhead width of seven eighths of an inch, unless otherwise

specifically permitted by this Article: Provided, however, blunt-type arrowheads may be used in taking game birds and small game animals including, but not by way of limitation, rabbits, squirrels, quail, grouse, turkeys and pheasants; provided that [in Alexander, Buncombe, Caldwell, Cherokee, Clay, Cleveland, Graham, Haywood, Macon, Madison, Mitchell, Polk, Rutherford, Transylvania and Yancey Counties] pistols with barrels not less than six inches in length and a muzzle velocity of not under 1100 feet per second and bullet weight of not less than 35 grains or more than 70 grains may be used in the hunting or taking of squirrels or rabbits on one's own land or on land in one's legal possession, or on lands of another where expressed permission has been granted therefor. Notwithstanding the previous sentence, foxes may be hunted with dogs, at any time day or night in the following counties: Alamance, Alexander, Alleghany, Anson, Ashe, Avery, Bertie, Buncombe, Burke, Cabarrus, Caldwell, Camden, Carteret, Catawba, Cherokee, Chowan, Clay, Cleveland, Craven, Currituck, Davidson, Davie, Edgecombe, Forsyth, Franklin, Gaston, Graham, Guilford, Harnett, Haywood, Henderson, Iredell, Jackson, Johnston, Jones, Lenoir, Lincoln, Macon, Madison, Martin, McDowell, Mecklenburg, Mitchell, Montgomery, Moore, Nash, Onslow, Pamlico, Pasquotank, Perquimans, Polk, Randolph, Rowan, Rutherford, Sampson, Stanly, Stokes, Surry, Swain, Transylvania, Tyrrell, Union, Vance, Warren, Washington, Watauga, Wayne, Wilkes, Wilson, Yadkin and Yancey. No person shall take any game animals or game birds or migratory game birds from any automobile, or from any engine-powered or self-propelled vehicle or any vehicle especially equipped to provide facilities for taking deer by any unlawful means, or by aid of or with the use of any jacklight, or other artificial light, net, trap, snare, fire, salt lick or poison; nor shall any such jacklight, net, trap, snare, fire, salt lick or poison be used or set to take any animals or birds; nor shall birds or animals be taken at any time from an airplane, power boat, sailboat, or any boat under sail, or any floating device towed by a power boat or sailboat or, during the hours between sunset and sunrise, from any other floating device; nor shall any person take any dove, wild turkey, or upland game bird on any field, or in any cover in which corn, wheat, or other grain has been deposited for the purpose of drawing such birds thereto. However, it shall be lawful to use an artificial light and firearms except where prohibited by the North Carolina Wildlife Resources Commission regulations when hunting raccoons or opossums with dogs, or when hunting frogs. A person may take game birds and wild animals during the open season therefor with the aid of dogs, unless specifically prohibited by this Article. It shall be lawful for individuals and organized field trial clubs or associations for the protection of game to run trials or train dogs at any time: Provided, that no shotgun or rifle be used and that no game birds or game animals shall be taken during the closed season by reason thereof. The Wildlife Resources Commission shall have, and is hereby given, full power and authority to make regulations defining the manner of taking fur-bearing animals and to prohibit the use of steel traps in any county or districts of the State when it shall appear necessary and advisable to the said Wildlife Resources Commission. Any person who shall cut down den trees in taking game or fur-bearing animals shall be guilty of a misdemeanor.

No person shall take any wild animal or wild bird at night with the aid of an artificial light if such taking is from any aircraft, vehicle, watercraft, or other conveyance; provided however that this section does not prohibit the collection of specimens for scientific and medical studies when conducted under permit issued by the North Carolina Wildlife Resources Commission.

It shall be unlawful for any person or persons to hunt with guns or dogs upon the lands of another without first having obtained permission from the owner or owners of such lands, and said permission so obtained may be continuous for one open hunting season only.

It shall be unlawful for any person to hunt, take or kill any upland game birds, squirrels or rabbits with or by means of any automatic-loading or hand-operated repeating shotgun capable of holding more than three shells, the magazine of which has not been cut off or plugged with a one-piece metal or wooden filler incapable of removal through the loading end thereof, so as to reduce the capacity of said gun to not more than three shells at one time in the magazine and chamber combined; provided, that this sentence shall not apply to any person while lawfully hunting on a licensed "controlled shooting preserve" as defined by G.S. 113-84(7). It shall be unlawful for any person while hunting wild birds and animals with a gun to refuse to surrender such gun for inspection upon request of a duly authorized officer. It shall also be unlawful to shoot any such birds while such birds are sitting on the ground.

It shall be unlawful for any person to possess, sell, or offer for sale any noose-type commercially manufactured snare by which an animal may be entangled and caught.

It shall be unlawful for any person to take or kill or attempt to take or kill any deer from or through the use of any boat or other floating device; provided that this section shall not prohibit the transportation of hunters, their guns, dogs, or other hunting equipment or their legally taken game by means of any boat or other floating device, and shall not prohibit the hunter shooting from his stand, if such stand is not within or a part of such boat or floating device. This paragraph shall not apply to the Counties of Beaufort, Burke, Camden, Carteret, Cherokee, Chowan, Columbus, Craven, Cumberland, Currituck, Dare, Edgecombe, Gates, Hertford, Hoke, Lenoir, Martin, Pamlico, Pasquotank, Perquimans, Person, Robeson, Surry, Swain, Tyrrell, Washington and Yadkin. With respect to the Roanoke River and its tributaries in Northampton and Bertie Counties, but not to any of its tributaries in Halifax and Edgecombe Counties, between the Roanoke River's intersection with U.S. Highway 301 at Weldon in Northampton County and its intersection with U.S. Highway 17 at Williamston in Bertie County, this paragraph shall apply; provided, however, this paragraph shall not apply to any other river or stream in Bertie, Edgecombe, Halifax and Northampton Counties. For the purposes of this section, no portion of the Roanoke River shall be deemed to lie in Martin County.

It shall be unlawful for any person to take any migratory waterfowl with the aid of bait or live decoys, or on, over or within 300 yards of any place where any grain, salt or other feed is exposed so as to constitute an attraction to migratory waterfowl or has been so exposed during any of the 10 consecutive days immediately preceding the taking, or on, over or within 300 yards of any place where tame or captive migratory waterfowl are present, unless such birds are and have been for a period of 10 consecutive days prior to such taking confined within an enclosure which substantially reduces the audibility of their calls and totally conceals such birds from the sight of wild migratory waterfowl. Nothing in this paragraph shall prohibit the taking of migratory waterfowl on or over standing crops, flooded croplands, grain crops properly shocked on the field where grown, or grains found scattered solely as the result of normal agricultural planting or harvesting. (C. S., s. 2124; 1935, c. 486, s. 20; 1939, c. 235, s. 1; 1949, c. 1205, s. 3; 1955, c. 104; 1959, cc. 207, 500; 1961, c. 1182; 1963, c. 381; c. 697, ss. 1, 3½; 1967, c. 858, s. 1; c. 1149, s. 1.5; 1969, cc. 75, 140; 1971, c. 439, ss. 1-3; c. 899, s. 1; 1973, c. 1096; c. 1262, s. 18; 1975, c. 669; 1977, c. 493; 1977, 2nd Sess., c. 1211.)

Editor's Note. —

The 1977, 2nd Sess., amendment added the third sentence in the first paragraph. The title of the amendatory act is: "An Act to Allow Hunting of Foxes at Night in Certain Counties."

The sentence added by the amendment purports to authorize such hunting "at any time day or night."

Cited in *State v. Cole*, 294 N.C. 304, 240 S.E.2d 355 (1978).

§ 113-109. Punishment for violation of Article.

(g) Any person who shall take as defined in G.S. 113-83 or possess any cougar (Felis concolor) shall be guilty of a misdemeanor and, upon conviction therefor, shall be fined not less than five hundred dollars (\$500.00) or imprisoned for not less than six months, or both in the discretion of the court. The provisions of this subsection shall not apply to any person who had in his possession on June 29, 1977, any cougar (Felis concolor) providing that person does not keep a cougar in a municipality that has an ordinance on this subject. (1935, c. 486, s. 25; 1939, c. 235, s. 2; c. 269; 1941, c. 231, s. 2; c. 288; 1945, c. 635; 1949, c. 1205, s. 4; 1953, c. 1141; 1963, c. 147; c. 697, ss. 2, 3½; 1965, c. 616; 1967, c. 729; c. 1149, s. 1; 1971, c. 423, s. 1; c. 524; c. 899, s. 2; 1973, c. 677; 1975, c. 216; 1977, c. 794, s. 2; 1977, 2nd Sess., c. 1296.)

Editor's Note. —

The 1977, 2nd Sess., amendment added the second sentence of subsection (g).

As the rest of the section was not changed by the amendment, only subsection (g) is set out.

SUBCHAPTER IV. CONSERVATION OF FISHERIES RESOURCES.**ARTICLE 14.***Commercial and Sports Fisheries Licenses and Taxes.*

§ 113-161. Nonresidents reciprocal agreements. — Persons who are not residents of North Carolina are not entitled to obtain licenses under the provisions of G.S. 113-152 except as hereinafter provided. Residents of jurisdictions which sell commercial fishing licenses to North Carolina residents are entitled to North Carolina commercial fishing licenses under the provisions of G.S. 113-152. Such licenses may be restricted in terms of area, gear and fishery by the commission so that the nonresidents are licensed to engage in North Carolina fisheries on the same or similar terms that North Carolina residents can be licensed to engage in the fisheries of such other jurisdiction. The secretary may enter into such reciprocal agreements with other jurisdictions as are necessary to allow nonresidents to obtain commercial fishing licenses in North Carolina subject to the foregoing provisions. (1965, c. 957, s. 2; 1973, c. 1262, ss. 28, 86; 1977, 2nd Sess., c. 1183.)

Editor's Note. — The 1977, 2nd Sess.,

amendment rewrote this section.

ARTICLE 16.*Cultivation of Oysters and Clams.*

§ 113-205. Registration of grants in navigable waters; exercise of private fishery rights.

Editor's Note. —

For article, "Public Rights and Coastal Zone Management," see 51 N.C.L. Rev. 1 (1972).

ARTICLE 17.

*Administrative Provisions; Regulatory Authority of Marine Fisheries Commission and Department.***§ 113-229. Permits to dredge or fill in or about estuarine waters or state-owned lakes.****Editor's Note. —**

For article, "Public Rights and Coastal Zone Management," see 51 N.C.L. Rev. 1 (1972).

§ 113-230. Orders to control activities in coastal wetlands.**Editor's Note. —**

For article, "Public Rights and Coastal Zone Management," see 51 N.C.L. Rev. 1 (1972).

Chapter 113A.

Pollution Control and Environment.

ARTICLE 7.

Coastal Area Management.

Part 1. Organization and Goals.

§ 113A-100. Short title.

Editor's Note. —

For article analyzing and evaluating this article in the light of the Federal Coastal Zone Management Act of 1972, see 53 N.C.L. Rev. 275 (1974).

For article, "The Coastal Area Management Act in the courts: a Preliminary Analysis," see 53 N.C.L. Rev. 303 (1974).

For article, "A Legislative History of the Coastal Area Management Act," see 53 N.C.L. Rev. 345 (1974).

For comment, "Urban Planning And Land Use Regulation: The Need For Consistency," see 14 Wake Forest L. Rev. 81 (1978).

Part 2. Planning Processes.

§ 113A-110. Land-use plans.

Editor's Note. — For comment on public

participation in local land use planning, see 53 N.C.L. Rev. 975 (1975).

Chapter 115.**Elementary and Secondary Education.****SUBCHAPTER II. ADMINISTRATIVE ORGANIZATION.****Article 38D.****Regional Educational Training Centers.****Article 5.****Sec.****County and City Boards of Education.**

115-315.27 to 115-315.31. [Reserved.]

Sec.

115-53. Liability insurance and waiver of immunity as to torts of agents, etc.

Article 38E.**North Carolina School of Science and Mathematics.****SUBCHAPTER IX. SCHOOL TRANSPORTATION.**

115-315.32. Establishment of North Carolina School of Science and Mathematics.

Article 22.

115-315.33. Board of Trustees; appointment; terms of office.

School Buses.

115-315.34. Budget; preparation; submission.

115-183. Use and operation of school buses.

115-183.1. Use of school buses by senior citizen groups.

SUBCHAPTER X. INSTRUCTION.**Article 24.****Courses of Study.**

115-204.1. School health education program to be developed and administered.

SUBCHAPTER II. ADMINISTRATIVE ORGANIZATION.**ARTICLE 5.*****County and City Boards of Education.***

§ 115-53. Liability insurance and waiver of immunity as to torts of agents, etc. — Any county or city board of education, by securing liability insurance as hereinafter provided, is hereby authorized and empowered to waive its governmental immunity from liability for damage by reason of death or injury to person or property caused by the negligence or tort of any agent or employee of such board of education when acting within the scope of his authority or within the course of his employment. Such immunity shall be deemed to have been waived by the act of obtaining such insurance, but such immunity is waived only to the extent that said board of education is indemnified by insurance for such negligence or tort.

Any contract of insurance purchased pursuant to this section must be issued by a company or corporation duly licensed and authorized to execute insurance contracts in this State and must by its terms adequately insure the county or city board of education against any and all liability for any damages by reason of death or injury to person or property proximately caused by the negligent acts or torts of the agents and employees of said board of education or the agents and employees of a particular school in a county or city administrative unit when acting within the scope of their authority or within the course of their employment. Any company or corporation which enters into a contract of insurance as above described with a county or city board of education, by such act waives any defense based upon the governmental immunity of such county or city board of education.

Every county or city board of education in this State is authorized and empowered to pay as a necessary expense the lawful premiums for such insurance.

Any person sustaining damages, or in case of death, his personal representative may sue a county or city board of education insured under this section for the recovery of such damages in any court of competent jurisdiction in this State, but only in the county of such board of education; and it shall be no defense to any such action that the negligence or tort complained of was in pursuance of governmental, municipal or discretionary function of such county or city board of education if, and to the extent, such county or city board of education has insurance coverage as provided by this section.

Except as hereinbefore expressly provided, nothing in this section shall be construed to deprive any county or city board of education of any defense whatsoever to any such action for damages or to restrict, limit, or otherwise affect any such defense which said board of education may have at common law or by virtue of any statute; and nothing in this section shall be construed to relieve any person sustaining damages or any personal representative of any decedent from any duty to give notice of such claim to said county or city board of education or to commence any civil action for the recovery of damages within the applicable period of time prescribed or limited by statute.

A county or city board of education may incur liability pursuant to this section only with respect to a claim arising after such board of education has procured liability insurance pursuant to this section and during the time when such insurance is in force.

No part of the pleadings which relate to or allege facts as to a defendant's insurance against liability shall be read or mentioned in the presence of the trial jury in any action brought pursuant to this section. Such liability shall not attach unless the plaintiff shall waive the right to have all issues of law or fact relating to insurance in such an action determined by a jury and such issues shall be heard and determined by the judge without resort to a jury and the jury shall be absent during any motions, arguments, testimony or announcement of findings of fact or conclusions of law with respect thereto unless the defendant shall request a jury trial thereon: Provided, that this section shall not apply to claims for damages caused by the negligent acts or torts of public school bus, or school transportation service vehicle drivers, while driving school buses and school transportation service vehicles when the operation of such school buses and service vehicles is paid from the State Nine Months School Fund.

The several county and city boards of education in the State are hereby authorized and empowered to take title to school buses purchased with local or community funds for the purpose of transporting pupils to and from athletic events and for other local school activity purposes, and commonly referred to as activity buses. The provisions of this section shall be fully applicable to the ownership and operation of such activity school buses. Activity buses may also be used as provided in G.S. 115-183.1. (1955, c. 1256; 1957, c. 685; 1959, c. 573, s. 2; 1961, c. 1102, s. 4; 1977, 2nd Sess., c. 1280, s. 3.)

Editor's Note. — The 1977, 2nd Sess., amendment added the last sentence of the section.

SUBCHAPTER VII. EMPLOYEES.

ARTICLE 17.

Principals' and Teachers' Employment and Contracts.

§ 115-142. System of employment for public school teachers.

Editor's Note. — administrative law, see 55 N.C.L. Rev. 898 (1977).
For survey of 1976 case law dealing with

Nothing in subdivision (m)(2) obligates the board to rehire or to advance a probationary teacher to career status when principal's adverse reports have not been disclosed. *Sigmon v. Poe*, 564 F.2d 1093 (4th Cir. 1977).

Subdivision (m)(2) Does Not Establish Property Interest under Fourteenth Amendment. — While subdivision (m)(2) of this section may create a right of action in the State

courts, it does not establish a property interest under the Fourteenth Amendment. *Sigmon v. Poe*, 564 F.2d 1093 (4th Cir. 1977).

While subsection (m)(2) of this section is phrased in part in language sometimes used in connection with due process or equal protection rights, the two should not be confused. *Sigmon v. Poe*, 564 F.2d 1093 (4th Cir. 1977).

§ 115-146. Duties of teachers generally; principals and teachers may use reasonable force in exercising lawful authority.

Editor's Note. — For note on constitutional restrictions on the infliction of corporal punishment, see 50 N.C.L. Rev. 911 (1972).

SUBCHAPTER IX. SCHOOL TRANSPORTATION.

ARTICLE 22.

School Buses.

§ 115-183. Use and operation of school buses. — Public school buses may be used for the following purposes only, and it shall be the duty of the superintendent of the school of each county and city administrative unit to supervise the use of all school buses operated by such county or city administrative unit so as to assure and require compliance with this section:

(7) Uses authorized by G.S. 115-183.1. (1955, c. 1372, art. 21, s. 4; 1957, c. 1103; 1969, c. 47; 1973, c. 869; 1977, c. 830, ss. 2, 3; 1977, 2nd Sess., c. 1280, s. 2.)

Editor's Note. — The 1977, 2nd Sess., the amendment, only the introductory amendment added subdivision (7). paragraph and subdivision (7) are set out.

As the rest of the section was not changed by

§ 115-183.1. Use of school buses by senior citizen groups. — (a) Any county board of education or city board of education may enter into agreements with the governing body of any county, city, or town, or with any State agency, or any agency established or identified pursuant to Public Law 89-73 (The Older Americans Act of 1965), as it is now or may be amended, to provide for the use of school buses to provide transportation for the elderly.

(b) Each agreement entered into under this section must provide the following:

- (1) That the board of education shall be reimbursed in full for the proportionate share of any and all costs, both fixed and variable, of such buses attributable to the uses of the bus pursuant to the agreement;
- (2) That the board of education shall be held harmless from any and all liability by virtue of uses of the buses pursuant to the agreement;
- (3) That adequate liability insurance is maintained under G.S. 115-53 to insure the board of education, and adequate insurance is maintained to protect the property of the board of education. The minimum limit of liability insurance shall not be less than the maximum amount of damages which may be awarded under the Tort Claims Act, G.S. 143-291. The costs of said insurance shall be paid by the agency contracting for the use of the bus, either directly or through the fee established by the agreement.

(c) Before any board of education shall enter into any agreement under this section, it must by resolution establish a policy for use of school buses by the elderly. The policy must give first priority to school uses under G.S. 115-183 and G.S. 115-53. The resolution must provide for a schedule of charges under this section. Such resolution, if adopted, shall be amended or readopted at least once per year to provide for adjustments to the schedule of charges or to provide for maintaining the same schedule of charges. If the price bid for the service by a private bus carrier is less than the schedule of charges adopted by the board of education, then the board of education may not enter into the agreement.

(d) No board of education shall be under any duty to sign any agreement under this section.

(e) No bus operated under the provisions of this section shall travel outside of the area consisting of the county or counties where the county or city board of education is located and the county or counties contiguous to that county or counties, but not outside of the State of North Carolina.

(f) Before any agreement under this section may be signed the State Board of Education shall adopt a uniform schedule of charges for the use of buses under this section. Such schedule must be approved by the Advisory Budget Commission before becoming effective. Such schedule shall include a charge by the hour and by the mile which shall cover all costs both fixed and variable, including depreciation, gasoline, fuel, labor, maintenance, and insurance. The schedule may be amended by the State Board of Education with the concurrence of the Advisory Budget Commission. The schedule of charges adopted by the local board of education under subsection (c) may vary from the State schedule only to cover changes in wages. (1977, 2nd Sess., c. 1280, s. 1.)

SUBCHAPTER X. INSTRUCTION.

ARTICLE 24.

Courses of Study.

§ 115-204.1. **School health education program to be developed and administered.** — (a) A comprehensive school health education program shall be developed and taught to pupils of the public schools of this State from kindergarten through ninth grade. This program shall be developed over a 10-year period beginning July 1, 1978.

(b) As used above, "comprehensive school health" includes the subject matter of mental and emotional health, drug and alcohol abuse prevention, nutrition, dental health, environmental health, family living, consumer health, disease control, growth and development, first aid and emergency care, and any like subject matter.

(c) The development and administration of this program shall be the responsibility of each local educational administrative unit in the State, a local school health education coordinator for each county, the State Department of Public Instruction, and a State School Health Education Advisory Committee.

(d) Each existing local educational administrative unit is eligible to develop and submit a plan for a comprehensive school health education program which shall meet all standards established by the State Board of Education, and to apply for funds to execute such plans.

(e) The State Department of Public Instruction shall supervise the development and operation of a statewide comprehensive school health education program including curriculum development, in-service training provision and promotion of collegiate training; learning material review; and assessment and evaluation of local programs in the same manner as for other programs. It is the intent of this legislation that a specific position or positions in Public Instruction shall be assigned responsibilities as set forth in this section.

(f) A State School Health Advisory Committee is hereby established.

- (1) The committee shall provide citizen input into the operations of the program; report annually to the State Board of Education on progress in accomplishing the provisions and intent of this legislation; provide advice to the department with regard to its duties under this section; and encourage development of higher education programs which would benefit health education in the public schools.
- (2) The committee shall meet as necessary but at least twice annually. It shall select annually a chairperson from among its own membership, each member having an equal vote and the chairperson shall appoint such subcommittees as may be necessary. Members of the committee shall serve without compensation; however, they shall be reimbursed by the Department of Public Instruction for travel and other expenses incurred in the performance of their duties as members of the committee (to the extent that funds are appropriated for this purpose).
- (3) The committee shall consist of 17 members: 10 appointed by the Governor, two by the State Board of Education, one by the Speaker of the House of Representatives, one by the President of the Senate, and three ex officio members: the Chief, Office of Health Education, North Carolina Department of Human Resources; the Chief, State Health Planning and Development Agency, North Carolina Department of Human Resources; and the Superintendent of Public Instruction, or their designates. The Governor's appointees shall be named in the following manner: one physician from a list of three names submitted by the North Carolina Medical Society; one physician from a list of three names submitted by the North Carolina Pediatric Society; one physician from a list of three names submitted by the North Carolina Chiropractic Association; one registered nurse from a list of three names submitted by the North Carolina Nurses' Association; one dentist from a list of three names submitted by the North Carolina Dental Society; one member from a list of three names submitted by the North Carolina Medical Auxiliary; one member from a list of three names submitted by the North Carolina Congress of Parents and Teachers, Inc.; one member from a list of three names submitted by the North Carolina Association for Health, Physical Education, and Recreation; one member from a list of three names submitted by the North Carolina Public Health Association; one member from a list of three names submitted by the North Carolina College Conference on Professional Preparation in Health and Physical Education. The State Board nominees shall represent local school administrative units and shall have been recommended by the Superintendent of Public Instruction. The Speaker's nominee shall be a member of the North Carolina House of Representatives and the President of the Senate's nominee shall be a member of the Senate.
- (4) The appointed members of the advisory committee shall serve for a term of three years; except that in the case of the initial appointments, the representative of the North Carolina Pediatric Society, one of the representatives of a local school administrative unit, the representative of the North Carolina Association for Health, Physical Education, and Recreation, and the member of the North Carolina General Assembly shall be appointed for a term of two years; and the representatives of the North Carolina Nurses' Association, the North Carolina Dental Society, the North Carolina Congress of Parents and Teachers, Inc., and the North Carolina Public Health Association shall be appointed for a term of one year. Each of these computations shall be made as of July 1, 1977. Thereafter, each succeeding term shall be for three years.

Appointed members may be reappointed up to a maximum of nine years of service. Vacancies shall be filled in the same manner as original appointments for the balance of the unexpired term. (1977, 2nd Sess., c. 1256, s. 1.)

Editor's Note. — Session Laws 1977, 2nd Sess., c. 1256, s. 3, makes the act effective July 1, 1978.

ARTICLE 38D.

Regional Educational Training Centers.

§§ 115-315.27 to 115-315.31: Reserved for future codification purposes.

ARTICLE 38E.

North Carolina School of Science and Mathematics.

§ 115-315.32. **Establishment of North Carolina School of Science and Mathematics.** — The North Carolina School of Science and Mathematics is established to be governed by a board of trustees described in this Article. (1977, 2nd Sess., c. 1219, s. 42.)

Editor's Note. — Session Laws 1977, 2nd Sess., c. 1219, s. 59, makes the act effective July 1, 1978. Session Laws 1977, 2nd Sess., c. 1219, s. 57, contains a severability clause.

§ 115-315.33. **Board of Trustees; appointment; terms of office.** — (a) The Board of Trustees of the North Carolina School of Science and Mathematics consists of the following members:

- (1) Five ex officio nonvoting members: the Chairman of the State Board of Education; the Superintendent of Public Instruction; the President of the Community College System; the President of the Association of Independent Colleges and Universities; and one member of the Board of Governors of The University of North Carolina designated by the Chairman of that Board.
- (2) Two members appointed by the Superintendent of Public Instruction: a science teacher; and a mathematics teacher; both of whom are from within the State.
- (3) Two members appointed by the Lieutenant Governor: a member of the Senate; and a superintendent of a local school system.
- (4) Two members appointed by the Speaker of the House of Representatives: a member of the House; and a principal of a local school system.
- (5) Fifteen members appointed by the Governor, at least 12 of whom shall be scientists and mathematicians. One of these scientists or mathematicians shall be designated by the Governor as Chairman of the Board of Trustees.

(b) The terms of the appointments of the Lieutenant Governor and of the Speaker of the House shall coincide with the terms of the particular appointing officer. The two initial appointments of the Superintendent of Public Instruction shall be for terms of four years. Five of the initial appointments of the Governor shall be for terms of two years; five shall be for terms of four years; and five shall be for terms of six years. With the exception of the appointments of the Lieutenant Governor and Speaker of the House, at the expiration of the terms

of the initial appointees, their successors shall be appointed for terms of six years, beginning July 1 in the year of the respective appointments.

(c) Vacancies in appointive terms shall be filled for the unexpired portion of the terms by appointment of the officer who appointed the person causing each vacancy. (1977, 2nd Sess., c. 1219, s. 42.)

§ 115-315.34. Budget; preparation; submission. — The Board of Trustees, assisted by administrative staff, shall prepare budgets for the School and shall submit these budgets directly to the Governor. (1977, 2nd Sess., c. 1219, s. 42.)

Chapter 116.
Higher Education.

Article 1.

The University of North Carolina.

Part 3. Constituent Institutions.

Sec.

116-36.1. Regulation of institutional trust funds.
116-36.2. Regulation of special funds of individual institutions.

Sec.

116-36.3. Regulation of institutional student auxiliary enterprise funds.

ARTICLE 1.

The University of North Carolina.

Part 2. Organization, Governance and Property of the University.

§ 116-11. Powers and duties generally.

Open Meetings Law Inapplicable. — Since the board of governors of the University of North Carolina has no governmental powers, i.e., no powers peculiar to the sovereign, the board of governors is not, itself, a “governmental body of this State,” and the Open

Meetings Law, § 143-318.2, does not extend to the meetings of its employees, even though such employees be deemed a “component part” of the board of governors. Student Bar Ass’n Bd. of Governors v. Byrd, 293 N.C. 594, 239 S.E.2d 415 (1977).

§ 116-16. Tax exemption.

Applied in In re North Carolina Forestry Foundation, Inc., 35 N.C. App. 414, 242 S.E.2d 492 (1978).

Cited in In re North Carolina Forestry Foundation, Inc., 35 N.C. App. 430, 242 S.E.2d 502 (1978).

Part 3. Constituent Institutions.

§ 116-36.1. Regulation of institutional trust funds. — (a) The Board is responsible for the custody and management of the trust funds of The University of North Carolina and of each institution. The Board shall adopt uniform policies and procedures applicable to the administration of these funds which shall assure that the receipt and expenditure of such funds is properly authorized and that the funds are appropriately accounted for. The Board may delegate authority, through the president, to the respective chancellors of the institutions when such delegation is necessary or prudent to enable the institution to function in a proper and expeditious manner.

(b) Trust funds shall be deposited with the State Treasurer who shall hold them in trust in separate accounts in the name of The University of North Carolina and of each institution. The cash balances of these accounts may be pooled for investment purposes, but investment earnings shall be credited pro rata to each participating account. For purposes of distribution of investment earnings, all trust funds of an institution shall be deemed a single account.

(c) Moneys deposited with the State Treasurer in trust fund accounts pursuant to this section, and investment earnings thereon, are available for expenditure by each institution without further authorization from the General Assembly.

(d) Trust funds are subject to the oversight of the State Auditor pursuant to G.S. 147-58 but are not subject to the provisions of the Executive Budget Act

except for capital improvements projects which shall be authorized and executed in accordance with G.S. 143-18.1.

(e) Each institution shall submit such reports or other information concerning its trust fund accounts as may be required by the Director of the Budget.

(f) Trust funds or the investment income therefrom shall not take the place of State appropriations or any part thereof, but any portion of these funds available for general institutional purposes shall be used to supplement State appropriations to the end that the institution may improve and increase its functions, may enlarge its areas of service, and may become more useful to a greater number of people.

(g) As used in this section, 'trust funds' means:

- (1) Moneys, or the proceeds of other forms of property, received by an institution as gifts, devises, or bequests that are neither presumed nor designated to be gifts, devises, or bequests to the endowment fund of the institution;
- (2) Moneys received by an institution pursuant to grants from, or contracts with, the United States Government or any agency or instrumentality thereof;
- (3) Moneys received by an institution pursuant to grants from, or contracts with, any State agencies, any political subdivisions of the State, any other states or nations or political subdivisions thereof, or any private entities whereby the institution undertakes, subject to terms and conditions specified by the entity providing the moneys, to conduct research, training or public service programs, or to provide financial aid to students;
- (4) Moneys collected by an institution to support extracurricular activities of students of the institution;
- (5) Moneys received from or for the operation by an institution of activities established for the benefit of scholarship funds or student activity programs;
- (6) Moneys received from or for the operation by an institution of any of its self-supporting auxiliary enterprises except student auxiliary services identified in G.S. 116-36.3;
- (7) Moneys received by an institution in respect to fees and other payments for services rendered by medical, dental or other health care professionals under an organized practice plan approved by the institution or under a contractual agreement between the institution and a hospital or other health care provider.

(h) Notwithstanding the provisions of subsection (b) of this section, the board may designate as the official depository of the funds identified in subsection (g) (7) of this section one or more banks or trust companies in this State. The amount of funds on deposit in an official depository shall be fully secured by deposit insurance, surety bonds, or investment securities of such nature, in such amounts, and in such manner as is prescribed by the State Treasurer for the security of public deposits generally. The available cash balance of funds deposited pursuant to this subsection shall be invested in interest-bearing deposits and investments so that the rate of return equals that realized from the investment of State funds generally.

(i) The cash balances on hand as of June 30, 1978, and all future receipts accruing thereafter, of funds identified in this section are hereby appropriated to the use of The University of North Carolina and its constituent institutions. (1977, 2nd Sess., c. 1136, s. 30.)

Editor's Note. — Session Laws 1977, 2nd Sess., c. 1136, s. 47, makes the act effective July 1, 1978.

Session Laws 1977, 2nd Sess., c. 1136, s. 45, contains a severability clause.

§ 116-36.2. Regulation of special funds of individual institutions. — (a) Notwithstanding any provisions of law other than G.S. 147-58, the chancellor of each institution is responsible for the custody and management of the special funds of that institution. The Board shall adopt uniform policies and procedures applicable to the administration of these funds which shall assure that the receipt and expenditure of such funds is properly authorized and that the funds are appropriately accounted for.

(b) As used in this section, "special funds of individual institutions" means:

- (1) Moneys received from or for the operation by an institution of its program of intercollegiate athletics;
- (2) Moneys held by an institution as fiscal agent for individual students, faculty, staff members, and organizations. (1977, 2nd Sess., c. 1136, s. 31.)

Editor's Note. — Session Laws 1977, 2nd Sess., c. 1136, s. 47, makes the act effective July 1, 1978.

Session Laws 1977, 2nd Sess., c. 1136, s. 45, contains a severability clause.

§ 116-36.3. Regulation of institutional student auxiliary enterprise funds. — (a) The chancellor of each institution, subject to uniform policies and procedures adopted by the Board of Governors, is responsible for the custody and management of the institutional student auxiliary enterprise funds of that institution. The custody and management of such funds is subject to the provisions of the Executive Budget Act and to the oversight of the State Auditor pursuant to G.S. 147-58.

(b) Institutional student auxiliary enterprise funds shall be deposited with the State Treasurer who shall hold them in trust in separate accounts in the name of The University of North Carolina and of each institution. The cash balances of these accounts may be pooled for investment purposes, but investment earnings shall be credited pro rata to each participating account. For the purpose of distribution of investment earnings, all student auxiliary enterprise funds of an institution shall be deemed a single account.

(c) As used in this section, "institutional student auxiliary enterprise funds" means moneys received from or for the operation by an institution of the following self-supporting student auxiliary services: housing; food; health and laundry. (1977, 2nd Sess., c. 1136, s. 32.)

Editor's Note. — Session Laws 1977, 2nd Sess., c. 1136, s. 47, makes the act effective July 1, 1978.

Session Laws 1977, 2nd Sess., c. 1136, s. 45, contains a severability clause.

ARTICLE 14.

General Provisions as to Tuition and Fees in Certain State Institutions.

§ 116-143. State-supported institutions of higher education required to charge tuition and fees.

Editor's Note. —
For survey of 1972 case law on establishing

residence for tuition purposes, see 51 N.C.L. Rev. 1012 (1973).

§ 116-143.1. Provisions for determining resident status for tuition purposes.

Editor's Note. —
For survey of 1972 case law on establishing

residence for tuition purposes, see 51 N.C.L. Rev. 1012 (1973).

§ 116-144. Higher fees from nonresidents may be charged.

Editor's Note. — For survey of 1972 case law on establishing residence for tuition purposes, see 51 N.C.L. Rev. 1012 (1973).

ARTICLE 18A.***Contracts of Minors Borrowing for Higher Education;
Scholarship Revocation.*****§ 116-174.1. Minors authorized to borrow for higher education; interest; requirements of loans.**

Editor's Note. —

For article, "The Contracts of Minors Viewed

from the Perspective of Fair Exchange," see 50 N.C.L. Rev. 517 (1972).

Chapter 120.**General Assembly.****Article 1.****Apportionment of Members; Compensation and Allowances.**

Sec.

120-3. Pay of members and officers of the General Assembly.

120-3.1. Subsistence and travel allowances for members of the General Assembly.

Article 8.**Elected Officers.**

Sec.

120-37. Elected officers; salaries; staff.

ARTICLE 1.*Apportionment of Members; Compensation and Allowances.*

§ 120-3. Pay of members and officers of the General Assembly. — The Speaker of the House shall be paid an annual salary of twelve thousand dollars (\$12,000), payable monthly, and an expense allowance of three hundred dollars (\$300.00) per month. The President pro tempore of the Senate, the Speaker pro tempore of the House, the minority leader in the House, and the minority leader in the Senate shall each be paid an annual salary of seven thousand five hundred dollars (\$7,500), payable monthly, and an expense allowance of two hundred dollars (\$200.00) per month. Every other member of the General Assembly shall be paid an annual salary of six thousand dollars (\$6,000), payable monthly, and an expense allowance of one hundred fifty dollars (\$150.00) per month. The salary and expense allowances provided in this section are in addition to any per diem compensation and any subsistence and travel allowance authorized by any other law with respect to any regular or extra session of the General Assembly, and service on any State board, agency, commission, standing committee and study commission. (1929, c. 2, s. 1; 1951, c. 23, s. 1; 1965, c. 917; c. 1157, s. 1; 1967, c. 1120; 1969, c. 1278, s. 1; 1971, c. 1200, s. 5; 1973, c. 1482, s. 1; 1977, 2nd Sess., c. 1249, ss. 1, 2.)

Editor's Note. —

The 1977, 2nd Sess., amendment, effective with the convening of the regular session of the 1979 General Assembly, increased the salaries and expense allowances in the first, second and third sentences and repealed former subsection

(b) relating to additional compensation for the presiding officers of the two houses, and former subsection (c), relating to members of the General Assembly wishing to be paid on an annual or semiannual basis.

§ 120-3.1. Subsistence and travel allowances for members of the General Assembly. — (a) In addition to compensation for their services, members of the General Assembly shall be paid the following allowances:

- (1) A weekly travel allowance for each week or fraction thereof that the General Assembly is in regular or extra session. The amount of the weekly travel allowance shall be calculated for each member by multiplying the actual round-trip mileage from that member's home to the City of Raleigh by the rate per mile allowed to State employees for official travel.
- (2) A travel allowance at the rate allowed by statute for State employees whenever the member is traveling as a representative of the General Assembly or of its committees or commissions, whether in or out of session, when such travel has been authorized by the Legislative Services Commission.
- (3) A subsistence allowance in the amount of forty-four dollars (\$44.00) per day for each day of the period during which the General Assembly remains in session.

- (4) A subsistence allowance in the sum of forty-four dollars (\$44.00) per day for each day on official legislative business, when the General Assembly is not in session, when traveling as a representative of the General Assembly or of its committees or commissions, with the approval of the Legislative Services Commission.
- (1977, 2nd Sess., c. 1249, ss. 3, 4.)

Editor's Note. —

The 1977, 2nd Sess., amendment, effective with the convening of the regular session of the 1979 General Assembly, increased the

allowances in subdivisions (3) and (4) of subsection (a) from \$35.00 to \$44.00 per day.

As the rest of the section was not changed by the amendment, only subsection (a) is set out.

ARTICLE 8.

Elected Officers.

§ 120-37. Elected officers; salaries; staff. — (a) At the convening of the first session of the General Assembly following each biennial election of members of the General Assembly, each house shall elect a principal clerk, a reading clerk and a sergeant-at-arms for terms of two years, subject to the condition that each officer shall serve at the pleasure of the house that elected him and shall serve until his successor is elected.

(b) The sergeant-at-arms and the reading clerk in each house shall be paid a salary of one hundred twenty-six dollars (\$126.00) per week, plus subsistence at the same daily rate provided for members of the General Assembly, plus mileage at the rate provided for members of the General Assembly for one round trip only from their homes to Raleigh and return. The sergeants-at-arms shall serve during sessions of the General Assembly and at such time prior to the convening of, and subsequent to adjournment or recess of, sessions as may be authorized by the Legislative Services Commission. The reading clerks shall serve during sessions only.

(c) The principal clerks shall be full-time officers. Each principal clerk shall be paid an annual salary of twenty-one thousand two hundred dollars (\$21,200), payable monthly. The Legislative Services Commission shall review the salary of the principal clerks prior to submission of the proposed operating budget of the General Assembly to the Governor and Advisory Budget Commission and shall make appropriate recommendations for changes in those salaries. Any changes enacted by the General Assembly shall be by amendment to this paragraph.

(d) The Legislative Services Commission may authorize additional full-time staff employees of the office of each principal clerk. The Speaker may assign to the Principal Clerk of the House additional duties for the periods between sessions and during recesses of the General Assembly. The President pro tempore of the Senate may assign to the Principal Clerk of the Senate additional duties for the periods between sessions and during recesses of the General Assembly.

(e) The principal clerks and the sergeants-at-arms may, upon authorization of the Legislative Services Commission, employ temporary assistants to prepare for each legislative session, serve during the session, and perform necessary duties following adjournment.

(f) Following adjournment sine die of each session of the General Assembly, each principal clerk shall retain in his office for a period of two years every bill and resolution considered by but not enacted or adopted by his house, together with the calendar books and other records deemed worthy of retention. At the

end of two years, these materials shall be turned over to the Division of Archives and History of the Department of Cultural Resources for ultimate retention or disposition. (1969, c. 1184, s. 7; 1977, 2nd Sess., c. 1278.)

Editor's Note. — The 1977, 2nd Sess., amendment, effective Jan. 1, 1979, rewrote this section.

Chapter 122.**Hospitals for the Mentally Disordered.****Article 4.****Voluntary Admission.**

Sec.

122-56.7. Judicial determination.

Article 5A.**Involuntary Commitment.**

122-58.22. Short-term treatment for alcoholic in need of care.

122-58.23. Long-term residential care for alcoholic who has not progressed in treatment.

Article 7A.**Chronic Alcoholics.**

122-65.6 to 122-65.9. [Repealed.]

Article 7B.**Public Intoxication.**

Sec.

122-65.10. Definitions.

122-65.11. Assistance to person who is intoxicated in public.

122-65.12. Cities and counties may employ officers to assist intoxicated persons.

122-65.13. Use of jail for care for intoxicated person.

Article 11.**Mentally Ill Criminals.**

122-83 to 122-84.1. [Repealed.]

ARTICLE 1.*Organization and Management.***§ 122-1. Jurisdiction and authority of Department of Human Resources.****Editor's Note. —**

For comment analyzing North Carolina

guardianship laws, see 54 N.C.L. Rev. 389 (1976).

ARTICLE 4.*Voluntary Admission.***§ 122-56.1. Declaration of policy.****Editor's Note. —** For comment on due process in North Carolina's mental health laws, see 52 N.C.L. Rev. 589 (1974).**§ 122-56.7. Judicial determination.**

(d) In addition to the notice of hearings and rehearings to the respondent and his counsel required under G.S. 122-58.5 and G.S. 122-58.11(a) respectively, notice shall be given by the clerk to the parent, person standing in loco parentis, or guardian of a minor or a person adjudicated non compos mentis in accordance with the provisions of G.S. 122-58.20. (1975, c. 839; 1977, c. 756.)

Editor's Note. —

Subsection (d) of this section is set out in order to correct an error in the last statutory reference in subsection (d).

As the rest of the section was not affected, only subsection (d) is set out.

ARTICLE 5A.*Involuntary Commitment.***§ 122-58.1. Declaration of policy.****Editor's Note. —**

For comment on due process in North

Carolina's mental health laws, see 52 N.C.L. Rev. 589 (1974).

Judge May Commit Individual to Private Hospital Designated by Department. — A district court judge acting under this Article may involuntarily commit an individual to a private hospital for the mentally ill if that

hospital has been designated or licensed by the Department of Human Resources. Opinion of Attorney General to Mr. Ben Sauber, Director of Advocate Program, Dorothea Dix Hospital, 47 N.C.A.G. 30 (1977).

§ 122-58.2. Definitions.

Applied in *In re Lee*, 35 N.C. App. 655, 242 S.E.2d 211 (1978).

§ 122-58.7. Length of involuntary commitment; rehearing.

Recording of Findings Mandatory. — The direction to the court under subsection (i) to record the facts which support its findings is

mandatory. In *re Koyi*, 34 N.C. App. 320, 238 S.E.2d 153 (1977).

§ 122-58.11. Rehearings.

The words “imminently dangerous” in subsection (d) simply mean that a person poses a danger to himself or others in the immediate future. In *re Ballard*, 34 N.C. App. 228, 237 S.E.2d 541 (1977).

An overt act may be clear, cogent and

convincing evidence which will support a finding of imminent danger, but is it not necessary that there be an overt act to establish imminent dangerousness. In *re Ballard*, 34 N.C. App. 228, 237 S.E.2d 541 (1977).

§ 122-58.22. Short-term treatment for alcoholic in need of care. — (a) A district court judge may take any one or more of the actions specified in subsection (e) if he finds that a person is an alcoholic and is in need of care. A person is an alcoholic if he habitually lacks self-control as to the use of intoxicating liquor, or uses intoxicating liquor to the extent that his health is substantially impaired or endangered or his social or economic function is substantially disrupted. An alcoholic is in need of care if his alcoholism is presently causing him to lose control over his own actions to the extent that he regularly has to depend on others to provide food, clothing, shelter, medical or other essential care for him.

(b) The alleged alcoholic may be brought before the district court judge under G.S. 14-446 after being found not guilty by reason of alcoholism of the offense of being intoxicated and disruptive in a public place, or under G.S. 122-65.11 after being assisted while intoxicated in public.

(c) If he believes it will be of value in making his determination, the district court judge may direct an alcoholism court counselor, if available, to conduct a prehearing review of the alleged alcoholic's drinking history and make recommendations on proper disposition for the person if he is found to be an alcoholic in need of care.

(d) If the alleged alcoholic is an indigent within the meaning of G.S. 7A-450, and does not waive counsel, the clerk of court or the district court judge shall appoint counsel to represent him. At the hearing in district court the alleged alcoholic shall be entitled to confront and cross-examine witnesses. The hearing may be held in chambers. If the person is found to be an alcoholic in need of care and ordered to participate in a treatment program as provided in subdivision (e)(2), the judge shall record the facts which support his findings and the alcoholic shall have the right of appeal from that order as set out in G.S. 122-58.9.

(e) If the district court judge finds the person to be an alcoholic in need of

care, he may take any one or more of the following actions:

- (1) Direct the alcoholic in cooperation with any member of his family or other responsible person to make and follow plans for his treatment in an alcoholism program operated or approved by the court;
- (2) Order the alcoholic to participate for up to 30 days in a particular outpatient or inpatient alcoholism program operated or approved by the Department of Human Resources, or commit the person to the custody of the Division of Mental Health Services for up to 30 days for assignment to an appropriate alcoholism program;
- (3) Refer the alcoholic to an alcoholism program or to a particular physician or other professional qualified to assist alcoholics;
- (4) Direct any alcoholism agency operated or approved by the Department of Human Resources to work with the alcoholic to develop and carry out a program for his treatment or care.

(f) As part of the action taken under subsection (e) the judge may direct the alcoholic or any public official concerned to make periodic reports for up to 30 days relating to the alcoholic's participation and progress in the activity to which he has been assigned. (1977, 2nd Sess., c. 1134, s. 4.)

Editor's Note. — Session Laws 1977, 2nd Sess., c. 1134, s. 8, makes the act effective Oct. 1, 1978.

§ 122-58.23. Long-term residential care for alcoholic who has not progressed in treatment. — (a) A district court judge may order a person committed for up to 180 days to a residential facility operated or approved for that purpose by the Department of Human Resources, if the judge determines by clear and convincing evidence that:

- (1) The person is an alcoholic who is in need of care as defined by G.S. 122-58.22; and
- (2) He has been given recent opportunities to participate in alcoholism treatment programs; and
- (3) He has willfully refused to participate or cooperate in such programs, or has failed to show significant and sustained progress toward overcoming his alcoholism.

(b) The alleged alcoholic may be brought before the district court judge under G.S. 14-446 after being found not guilty by reason of alcoholism of the offense of being intoxicated and disruptive in a public place, or under G.S. 122-65.11 after being assisted while intoxicated in public. The provisions of subsections (c) and (d) of G.S. 122-58.22 shall also be applicable to proceedings under this section. Notice of the district court hearing shall be given to the alleged alcoholic and his counsel by the clerk of court at least 48 hours in advance of the scheduled appearance unless counsel waived notice for the alleged alcoholic.

(c) A person committed to a residential facility for up to 180 days under subsection (a) may be released at any time prior to the end of that period when the director of the facility determines that the person is no longer in need of the care of that facility.

(d) If at the end of the period of commitment imposed under subsection (a), the director of the residential facility is of the opinion that the alcoholic is in need of further care at the facility, he may request a hearing for an additional commitment under the procedures of G.S. 122-58.11. The proceeding shall be the same as for involuntary commitment under that section except that the issue to be determined by the district court judge is whether the person should be committed under subsection (a). (1977, 2nd Sess., c. 1134, s. 4.)

Editor's Note. — Session Laws 1977, 2nd Sess., c. 1134, s. 8, makes the act effective Oct. 1, 1978.

ARTICLE 7A.

Chronic Alcoholics.

§§ 122-65.6 to 122-65.9: Repealed by Session Laws 1977, 2nd Sess., c. 1134, s. 6, effective October 1, 1978.

Cross Reference. — For present provisions as to public intoxication, see §§ 14-443 et seq., § 122-65.10 et seq.

ARTICLE 7B.

Public Intoxication.

§ 122-65.10. **Definitions.** — As used in this Article:

- (1) "Intoxicated" is the condition of a person whose mental or physical functioning is presently substantially impaired as a result of the use of alcohol; and
- (2) "Officer" is a law-enforcement officer with the power of arrest, or an officer employed by a city or county under G.S. 122-65.12; and
- (3) A "public place" is a place which is open to the public, whether it is publicly or privately owned. (1977, 2nd Sess., c. 1134, s. 2.)

Editor's Note. — Session Laws 1977, 2nd Sess., c. 1134, s. 8, makes the act effective Oct. 1, 1978.

§ 122-65.11. **Assistance to person who is intoxicated in public.** — (a) An officer may assist a person found intoxicated in a public place by taking any of the following actions:

- (1) The officer may direct or transport the intoxicated person home;
- (2) The officer may direct or transport the intoxicated person to the residence of another person willing to accept him;
- (3) If the intoxicated person is apparently in need of and unable to provide for himself food, clothing or shelter, but is not apparently in need of immediate medical care, the officer may direct or transport him to an appropriate public or private shelter facility approved for this purpose by the Department of Human Resources; or
- (4) If the intoxicated person is apparently in need of but unable to provide for himself immediate medical care, the officer may direct or transport him to a community mental health center, hospital, or physician's office; or the officer may direct or transport the person to any other appropriate health care facility approved for this purpose by the Department of Human Resources.

(b) In providing the assistance authorized by subsection (a), the officer may use reasonable force to restrain the intoxicated person if it appears necessary to protect himself, the intoxicated person or others. No officer may be held criminally or civilly liable for assault, false imprisonment, or other torts or crimes on account of reasonable measures taken under authority of this Article.

(c) If the officer takes the action described in either subdivision (a)(3) or (a)(4) above, the facility to which the intoxicated person is taken may detain him only until he becomes sober, or a maximum of 24 hours, unless the officer or someone

at the facility has obtained an order from a clerk or magistrate under subsection (d). The person may stay a longer period if he wishes to do so and the facility is able to accommodate him.

(d) Upon finding that it is probable that a person assisted under subdivision (a)(3) or (a)(4) is an alcoholic in need of care as defined by G.S. 122-58.22 or G.S. 122-58.23, a clerk or magistrate may order that person detained until he can appear before a district court judge for a hearing to determine if he is an alcoholic in need of care. The person may be detained no more than 96 hours for this purpose. The clerk or magistrate may direct that the person be kept at the facility to which he was taken under subdivision (a)(3) or (a)(4), or at any other facility approved for this purpose by the Department of Human Resources. If the district court judge is unable to make a determination whether the person is an alcoholic in need of care at the time the alleged alcoholic is initially brought before him, he may order the person to return to court at any time within the next 15 days to complete the determination. (1977, 2nd Sess., c. 1134, s. 2.)

§ 122-65.12. Cities and counties may employ officers to assist intoxicated persons. — A city or county may employ officers to assist persons who are intoxicated in public. Officers employed for this purpose shall be trained to give assistance to those who are intoxicated in public, including the administration of first aid. An officer employed by a city or county to assist intoxicated persons shall have the powers and duties set out in G.S. 122-65.11 within the same territory in which criminal laws may be enforced by law-enforcement officers of that city or county. (1977, 2nd Sess., c. 1134, s. 2.)

§ 122-65.13. Use of jail for care for intoxicated person. — In addition to the actions authorized by G.S. 122-65.11(a), an officer may assist a person found intoxicated in a public place by directing or transporting that person to a city or county jail. That action may be taken only if the intoxicated person is apparently in need of and unable to provide for himself food, clothing or shelter, but is not apparently in need of immediate medical care, and no other facility is readily available to receive him. The officer and employees of the jail shall be exempt from liability as provided in G.S. 122-65.11(b). The intoxicated person may be detained at the jail only until he becomes sober, or a maximum of 24 hours, and may be released at any time to a relative or other person willing to be responsible for his care. (1977, 2nd Sess., c. 1134, s. 3.)

Editor's Note. — Session Laws 1977, 2nd Sess., c. 1134, s. 8, makes the act effective Oct. 1, 1978.

ARTICLE 11.

Mentally Ill Criminals.

§§ 122-83 to 122-84.1: Repealed by Session Laws 1977, c. 711, s. 33, effective July 1, 1978.

Editor's Note. — Session Laws 1977, c. 711, s. 34, provides: "All statutes which refer to sections repealed or amended by the act shall be deemed, insofar as possible, to refer to those provisions of this act which accomplish the same or an equivalent purpose."

Session Laws 1977, c. 711, s. 35, provides: "None of the provisions of this act providing for the repeal of certain sections of the General

Statutes shall constitute a reenactment of the common law."

Session Laws 1977, c. 711, s. 36, contains a severability clause.

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all

matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered

against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

Article 2
Salaries and Leave of State Employees

Article 7
The Privacy of State Employee Personnel Records

Article 1
State Personnel System Established

§ 126-4. Powers and duties of State Personnel Commission

Editor's Note: — For survey of 1977 case law dealing with administrative law, see 15 N.J.L. Rep. 508 (1977).
In determining whether applicant's fees are allowable in a proceeding brought by an employer, a former employer or an applicant for employment, the State Personnel

Article 1
Editor's Note: — For survey of 1977 case law dealing with administrative law, see 15 N.J.L. Rep. 508 (1977).

Article 1
State Personnel System Established

§ 126-4. Powers and duties of State Personnel Commission

Commission shall appoint, remove, suspend, demote, promote or transfer any person in the State Personnel System, subject to the approval of the State Personnel Commission.

§ 126-5. Employees subject to Chapter restrictions

Secretaries Automatically Exempt under Subdivision (d)(3) and Management Exempt under Subdivision (d)(4). — Confidential employees named in subdivision (d)(3) of the section are automatically exempt from confidential provisions as when persons designated as exempt because they are regular

employees under the State Personnel System, subject to the approval of the State Personnel Commission.

Article 2
Salaries and Leave of State Employees

§ 126-7. Performance salary increases for State employees. — (a) Any plan considered a part of the personnel policy of this State may be adopted. If provided in the compensation plan shall be granted in accordance with the plan of efficiency as established by the State Personnel Commission. (b) Any employee whose salary is at or below the third step of the salary range shall be placed in the class to which the position is assigned shall be granted a salary increase in an amount corresponding to the increments between steps of the applicable salary range at least once each year if the individual's performance warrants the increase. Prior to July 1 of each biennium, each agency, board, commission, department or institution of State government subject to the provisions of this Article shall file with the State Personnel Director a written description of the plan or method it is currently following in awarding or allowing a salary or merit salary increments. At the same time, each such agency, board, commission, department or institution shall cause a copy thereof to be distributed to each employee. The State Personnel Director, with the approval of the State Personnel Commission, shall modify, alter or discontinue any such plan submitted to him which he deems not to be in accordance with the provisions

Chapter 123A.

Industrial Development.

§ 123A-1. Short title.

Editor's Note. — For survey of 1973 case law on the constitutionality of this Chapter, see 52 N.C.L. Rev. 859 (1974).

§ 123-55.12. Cities and counties may employ officers to assist intoxicated persons. — A city or county may employ officers to assist persons who are intoxicated in public. Officers employed for this purpose shall be trained to give assistance to those who are intoxicated in public, including the administration of first aid. An officer employed by a city or county to assist intoxicated persons shall have the powers and duties set out in G.S. 123-55.11 within the same territory in which criminal laws may be enforced by law-enforcement officers of that city or county. (1977, 2nd Sess., c. 1134, s. 2.)

§ 123-55.13. The official for care for intoxicated person. — In addition to the actions authorized by G.S. 123-55.12, an officer may assist a person found intoxicated in a public place by directing or transporting that person to a city or county jail. That action may be taken only if the intoxicated person is apparently in need of and unable to provide for himself food, clothing or shelter, but is not apparently in need of immediate medical care, and no other facility is readily available to receive him. The officer and employees of the jail shall be exempt from liability as provided in G.S. 123-55.11(b). The intoxicated person may be detained at the jail only until he becomes sober, or a maximum of 24 hours, and may be released at any time to a relative or other person willing to be responsible for his care. (1975, 2nd Sess., c. 1134, s. 3.)

Editor's Note. — Session Laws 1977, 2nd Sess., c. 1134, s. 2, makes this act effective July 1, 1978.

ARTICLE 11.

Mental Health Services.

§§ 123-53 to 123-54.11. Repealed by Session Laws 1977, c. 711, s. 33, effective July 1, 1978.

Editor's Note. — Session Laws 1977, c. 711, s. 34 provides: "All statutes which refer to services repealed or amended in this act shall be deemed, insofar as possible, to refer to those provisions of this act which comply with the intent of an equivalent purpose."

Session Laws 1977, c. 711, s. 35 provides: "None of the provisions of this act pertaining to the repeal or repeal sections of the General

Statutes shall constitute a amendment of the common law."

Session Laws 1977, c. 711, s. 36 contains a severability clause.

Session Laws 1977, c. 711, s. 38, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 33, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and expire on the

Chapter 126.

State Personnel System.

Article 2.

Salaries and Leave of State Employees.

Sec.

126-7. Performance salary increases for State employees.

Article 7.

The Privacy of State Employee Personnel Records.

126-24. Confidential information in personnel files; access to such information.

ARTICLE 1.

State Personnel System Established.

§ 126-4. Powers and duties of State Personnel Commission.

Editor's Note. — For survey of 1976 case law dealing with administrative law, see 55 N.C.L. Rev. 898 (1977).

In determining whether attorney's fees are allowable in a proceeding brought by an employee, a former employee or an application for employment, the State Personnel

Commission should apply statutory changes in circumstances in which attorney's fees may be awarded according to the date the cause of action arose. Opinion of Attorney General to Mr. Harold H. Webb, Director, Office of State Personnel, 47 N.C.A.G. 39 (1977).

§ 126-5. Employees subject to Chapter; exemptions.

Secretaries Automatically Exempt under Subdivision (d)(3) and Designated Exempt under Subdivision (d)(4). — Confidential secretaries named in subdivision (d)(3) of this section are automatically exempt while confidential secretaries to other persons designated as exempt because they are in policy

making positions must also be redesignated exempt pursuant to subdivision (d)(4) of this section in order to be exempt. Opinion of Attorney General to Mr. Harold H. Webb, Director, Office of State Personnel, 47 N.C.A.G. 61 (1977).

ARTICLE 2.

Salaries and Leave of State Employees.

§ 126-7. Performance salary increases for State employees. — It shall be considered a part of the personnel policy of this State that salary increases as provided in the compensation plan shall be granted in accordance with a standard of efficiency as established by the State Personnel Commission. Each employee whose salary is at or below the third step of the salary range established for the class to which the position is assigned shall be granted a salary increase in an amount corresponding to the increments between steps of the applicable salary range at least once each year if the individual's performance merits the increase. Prior to July 1 of each biennium, each agency, board, commission, department, or institution of State government subject to the provisions of this Article shall file with the State Personnel Director a written description of the plan or method it is currently following in awarding or allocating efficiency or merit salary increments. At the same time, each such agency, board, commission, department, or institution shall cause a copy thereof to be distributed to each employee. The State Personnel Director, with the approval of the State Personnel Commission, shall modify, alter or disapprove any such plan submitted to him which he deems not to be in accordance with the provisions

of this Article. Within the limit of available funds, each employee meeting higher standards may be granted increases up to but not exceeding the maximum of the salary range established for the class to which his position is assigned. If, in addition to the salary ranges, the State Personnel Commission shall establish uniform provisions for a system of payments over and above the standard salary ranges on the basis of longevity in service, that plan of payments shall not be considered in applying this policy governing annual salary increments. The head of each department, bureau, agency, or commission, when making his budget request for the ensuing biennium, shall anticipate the funds which will be required during the biennium for the purpose of paying salary increments and shall include those amounts in his budget request. In no case shall the amount estimated for annual increments above the third step of the range exceed two thirds of the sum which would be required to grant increments to all the personnel of the agency then receiving or who will receive a salary equal to or above the third step of the salary range. With the approval of the State Personnel Commission, State departments, bureaus, agencies, or commissions with 25 or less employees subject to the provisions of this Chapter may exceed the two-thirds restrictions herein provided. (1965, c. 640, s. 2; 1975, c. 667, s. 2; 1977, c. 802, s. 40.5; c. 866, s. 6; 1977, 2nd Sess., c. 1213.)

Editor's Note. —

The 1977, 2nd Sess., amendment rewrote the second sentence.

ARTICLE 7.

The Privacy of State Employee Personnel Records.

§ 126-24. Confidential information in personnel files; access to such information. — All other information contained in a personnel file is confidential and shall not be open for inspection and examination except to the following persons.

- (1) The employee, applicant for employment, former employee, or his properly authorized agent, who may examine his own personnel file in its entirety except for (i) letters of reference solicited prior to employment, or (ii) information concerning a medical disability, mental or physical, that a prudent physician would not divulge to a patient. An employee's medical record may be disclosed to a licensed physician designated in writing by the employee;
- (2) The supervisor of the employee;
- (3) Members of the General Assembly who may inspect and examine personnel records under the authority of G.S. 120-19;
- (4) A party by authority of a proper court order may inspect and examine a particular confidential portion of a State employee's personnel file; and
- (5) An official of an agency of the federal government, State government or any political subdivision thereof. Such an official may inspect any personnel records when such inspection is deemed by the department head of the employee whose record is to be inspected or, in the case of an applicant for employment or a former employee, by the department head of the agency in which the record is maintained as necessary and essential to the pursuance of a proper function of said agency; provided, however, that such information shall not be divulged for purposes of assisting in a criminal prosecution, nor for purposes of assisting in a tax investigation.

Notwithstanding any other provision of this Chapter, any department head may, in his discretion, inform any person or corporation of any promotion,

demotion, suspension, reinstatement, transfer, separation, dismissal, employment or nonemployment of any applicant, employee or former employee employed by or assigned to his department or whose personnel file is maintained in his department and the reasons therefor and may allow the personnel file of such person or any portion thereof to be inspected and examined by any person or corporation when such department head shall determine that the release of such information or the inspection and examination of such file or portion thereof is essential to maintaining the integrity of such department or to maintaining the level or quality of services provided by such department; provided that prior to releasing such information or making such file or portion thereof available as provided herein, such department head shall prepare a memorandum setting forth the circumstances which the department head deems to require such disclosure and the information to be disclosed. The memorandum shall be retained in the files of said department head and shall be a public record. (1975, c. 257, s. 1; 1977, c. 866, s. 10; 1977, 2nd Sess., c. 1207.)

Editor's Note. —

The 1977, 2nd Sess., amendment, effective

July 1, 1978, added the last paragraph of the section.

Chapter 128.**Offices and Public Officers.****Article 3.****Retirement System for Counties, Cities and Towns.**

Sec.

128-21. Definitions.

128-27. Benefits.

ARTICLE 1.*General Provisions.***§ 128-10. Citizen to recover funds of county or town retained by delinquent official.**

Editor's Note. — For a comment on taxpayers' actions, see 13 Wake Forest L. Rev. 397 (1977).

ARTICLE 3.*Retirement System for Counties, Cities and Towns.*

§ 128-21. Definitions. — The following words and phrases as used in this Article, unless a different meaning is plainly required by the context, shall have the following meanings:

- (10) "Employee" shall mean any person who is regularly employed in the service of and whose salary or compensation is paid by the employer as defined in subdivision (11) of this section, including employees of any light and water board or commission, and full-time employees of any housing authority created and operating under and by virtue of Chapter 157 of the General Statutes, whether employed or appointed for stated terms or otherwise, except teachers in the public schools and except such employees who hold office by popular election as are not required to devote a major portion of their time to the duties of their office. "Employee" shall also mean all full-time, paid firemen who are employed by any fire department that serves a city or county or any part thereof and that is supported in whole or in part by municipal or county funds. In all cases of doubt the Board of Trustees shall decide who is an employee.

Editor's Note. —

The introductory language and subdivision (10) of this section are set out to correct an error in subdivision (10) in the 1977 Cumulative Supplement.

As the rest of the section was not changed, only the introductory language and subdivision (10) are set out.

§ 128-27. Benefits.

(b5) Service Retirement Allowances of Members Retiring on or after July 1, 1976, but prior to July 1, 1978. — Upon retirement from service, in accordance with subsection (a) above, on or after July 1, 1976, but prior to July 1, 1978, a member shall receive a service retirement allowance computed as follows:

- (1) If the member's service retirement date occurs on or after his sixty-fifth birthday, regardless of his years of creditable service, or after the completion of 30 years of creditable service, such allowance shall be

equal to one and one-half percent (1½%) of his average final compensation, multiplied by the number of years of his creditable service.

- (2a) If the member's service retirement date occurs on or after his sixtieth birthday but before his sixty-fifth birthday and prior to his completion of 30 or more years of service, his service retirement allowance shall be computed as in (1) above, but shall be reduced by one quarter of one percent (¼ of 1%) thereof for each month by which his retirement date precedes the first day of the month coincident with or next following his sixty-fifth birthday.
 - (2b) If the member's service retirement date occurs before his sixtieth birthday and prior to his completion of 30 or more years of creditable service, his service retirement allowance shall be the actuarial equivalent of the allowance payable at the age of 60 years as computed in (2a) above.
 - (3) Notwithstanding the foregoing provisions, any member whose creditable service commenced prior to July 1, 1965, and uniformed policemen or firemen not covered under the Social Security Act employed thereafter, shall receive not less than the benefits provided by G.S. 128-27(b).
- (b6) Service Retirement Allowances of Members Retiring on or after July 1, 1978. — Upon retirement from service, in accordance with subsection (a) above, on or after July 1, 1978, a member shall receive a service retirement allowance computed as follows:

- (1) If the member's service retirement date occurs on or after his 65th birthday, regardless of his years of creditable service, or after the completion of 30 years of creditable service, such allowance shall be equal to one and fifty-five one-hundredths percent (1.55%) of his average final compensation, multiplied by the number of years of his creditable service.
 - (2a) If the member's service retirement date occurs after his 60th and before his 65th birthday and prior to his completion of 30 or more years of creditable service, his retirement allowance shall be computed as in (1) above, but shall be reduced by one quarter of one percent (¼ of 1%) thereof for each month by which his retirement date precedes the first day of the month coincident with or next following his 65th birthday.
 - (2b) If the member's service retirement date occurs before his 60th birthday and prior to his completion of 30 or more years of creditable service, his retirement allowance shall be the actuarial equivalent of the allowance payable at the age of 60 years as computed in (2a) above.
 - (3) Notwithstanding the foregoing provisions, any member whose creditable service commenced prior to July 1, 1965, and uniformed policemen or firemen not covered under the Social Security Act employed thereafter, shall receive not less than the benefits provided by G.S. 128-27(b).
- (l) Death Benefit. — The provisions of this subsection shall become effective for any employer only after an agreement to that effect has been executed by the employer and the Director of the Retirement System.

Upon receipt of proof, satisfactory to the Board of Trustees, of the death, in service, of a member who had completed at least one full calendar year of membership in the System, there shall be paid to such person as he shall have nominated by written designation duly acknowledged and filed with the Board of Trustees, if such person is living at the time of the member's death, otherwise to the member's legal representatives, a death benefit. Such death benefit shall be equal to the greater of:

- (1) The compensation on which contributions were made by the member

during the calendar year preceding the year in which his death occurs, or

- (2) The compensation on which contributions were made by the member during the 12-month period ending on the last day of the month preceding the month in which his death occurs, or
- (3) If the member had applied for and was entitled to receive a disability retirement allowance and such disability retirement allowance had not been discontinued or revoked within 366 days of his last date of actual service, the compensation on which contributions were made by the member during the 12-month period ending on the last day of the month preceding the month in which his last day of actual service occurred; subject to a maximum of twenty thousand dollars (\$20,000). Such death benefit shall be payable apart and separate from the payment of the member's accumulated contributions on his death pursuant to the provisions of subsection (f) of this G.S. 128-27. For purposes of this subsection (l), a member shall be deemed to be in service at the date of his death if his last day of actual service occurred not more than 90 days before the date of his death or if his last day of actual service occurred not more than 366 days before the date of his death, on or after July 1, 1978, if such member during said one-year period had applied for and was entitled to receive a disability retirement allowance, provided said disability retirement allowance had not been discontinued or revoked during said one-year period.

Notwithstanding the above provisions, the death benefit shall be payable on account of the death of any member who died or dies on or after January 1, 1974, after attaining age 65, if he had not yet attained age 66, was at the time of death completing the work year for those individuals under specific contract, or during the fiscal year for those individuals not under specific contract, in which he attained age 65, and otherwise met all conditions for payment of the death benefit.

The death benefit provided in this subsection (l) shall not be payable, notwithstanding the member's compliance with all the conditions set forth in the preceding paragraph, if his death occurs

- (1) After June 30, 1969 and after he has attained age 70; or
- (2) After December 31, 1969 and after he has attained age 69; or
- (3) After December 31, 1970 and after he has attained age 68; or
- (4) After December 31, 1971 and after he has attained age 67; or
- (5) After December 31, 1972 and after he has attained age 66; or
- (6) After December 31, 1973 and after he has attained age 65.

Notwithstanding the above provisions, the Board of Trustees may and is specifically authorized to provide the death benefit according to the terms and conditions otherwise appearing in this subsection in the form of group life insurance, either (i) by purchasing a contract or contracts of group life insurance with any life insurance company or companies licensed and authorized to transact business in this State for the purpose of insuring the lives of members in service, or (ii) by establishing a separate reserve fund under the Retirement System for such purpose. To that end the Board of Trustees is authorized, empowered and directed to investigate the desirability of utilizing group life insurance by either of the foregoing methods for the purpose of providing the death benefit. If a separate reserve fund is established it shall be operated in accordance with rules and regulations adopted by the Board of Trustees and all investment earnings on the reserve fund shall be credited to such fund.

In administration of the death benefit the following shall apply:

- (1) For the purpose of determining eligibility only, in this subsection "calendar year" shall mean any period of 12 consecutive months. For all other purposes in this subsection, "calendar year" shall mean the 12 months beginning January 1 and ending December 31.
- (2) Last day of actual service shall be:

a. When employment has been terminated, the last day the member actually worked.

b. When employment has not been terminated, the date on which an absent member's sick and annual leave expire.

(3) For a period when a member is on leave of absence, his status with respect to the death benefit will be determined by the provisions of G.S. 128-26(g).

(4) A member on leave of absence from his position as a local governmental employee for the purpose of serving as a member or officer of the General Assembly shall be deemed to be in service during sessions of the General Assembly and thereby covered by the provisions of the death benefit, if applicable. The amount of the death benefit for such member shall be the equivalent of the salary to which the member would have been entitled as a local governmental employee during the 12-month period immediately prior to the month in which death occurred, not to exceed twenty thousand dollars (\$20,000).

(u) Notwithstanding the foregoing provisions, the increase in allowance to each beneficiary on the retirement rolls as of July 1, 1977, which shall become payable on July 1, 1978, as otherwise provided in G.S. 128-27(k), shall be the current maximum four percent (4%) plus an additional two and one-half percent (2½%) for the year beginning July 1, 1978. The provisions of this subsection shall apply also to the allowance of a surviving annuitant of a beneficiary.

(v) Increases in Allowances Paid Beneficiaries Retired prior to July 1, 1976. — From and after July 1, 1978, the monthly allowances paid to or on account of beneficiaries who commenced receiving such allowances prior to July 1, 1976, shall be increased by seven percent (7%) thereof. This increase shall be calculated before monthly allowances, as of July 1, 1978, have been increased to the extent provided for in the preceding subsections (k) and (u). The provisions of this subsection shall apply also to the allowance of a surviving annuitant of a beneficiary. (1939, ch. 390, s. 7; 1945, c. 526, s. 4; 1951, c. 274, ss. 4-6; 1955, c. 1153, ss. 4-6; 1957, c. 855, ss. 1-4; 1959, c. 491, ss. 5-8; 1961, c. 515, ss. 2, 6, 7; 1965, c. 781; 1967, c. 978, ss. 3-7; 1969, c. 442, ss. 7-14; c. 898; 1971, c. 325, ss. 12-16, 19; c. 326, ss. 3-7; 1973, c. 243, ss. 3-7; c. 244, ss. 1-3; c. 816, s. 4; c. 994, ss. 2, 4; c. 1313, ss. 1, 2; 1975, c. 486, ss. 1, 2; c. 621, ss. 1, 2; 1975, 2nd Sess., c. 983, ss. 126-128; 1977, 2nd Sess., c. 1240.)

Editor's Note. —

The 1977, 2nd Sess., amendment, effective July 1, 1978, added "but prior to July 1, 1978" in the catchline and introductory paragraph of subsection (b5) and added subsection (b6). In subsection (l) the amendment added "or" at the end of subdivision (2) and rewrote subdivision (3); in the second sentence of the second paragraph, increased the maximum benefit in that

sentence from \$15,000 to \$20,000; added the language beginning "or if his last day" at the end of the third sentence of the second paragraph; added the third paragraph; and increased the maximum benefit in subdivision (4) of the last paragraph from \$15,000 to \$20,000. The amendment also added subsections (u) and (v).

Only the subsections added or changed by the amendment are set out.

Chapter 130. Public Health.

Article 2.

Administration of Public Health Law.

Sec.

130-9.5. Nursing home advisory committees.

Article 13B.

Solid Waste Management.

130-166.16. Definitions.

130-166.17. Solid waste unit in Department of Human Resources.

130-166.18. Solid waste management program.

130-166.19. Receipt and distribution of funds.

130-166.20. Single agency designation.

130-166.20A. Effect on laws applicable to water pollution control.

130-166.21. Recordation of sanitary landfill site permits.

130-166.21A. Sludge deposits at sanitary landfills.

130-166.21B. Imminent hazard.

130-166.21C. Information received pursuant to this Article.

130-166.21D. Construction.

130-166.21E. Penalties; remedies.

130-166.21F. Sections 130-203 and 130-205 inapplicable.

Article 15A.

Home Health Agencies.

Sec.

130-170.2. Home health services to be provided in all counties.

Article 21.

Postmortem Medicolegal Examinations.

130-199. Duties of medical examiners upon receipt of notice; reports; fees.

Article 30.

Nursing Home Patients' Bill of Rights.

130-278 to 130-282. [Reserved.]

Article 31.

Glaucoma and Diabetes Program.

130-283. Department of Human Resources to establish program.

130-284. Powers and duties of the Department.

130-285. Rules and regulations.

ARTICLE 2.

Administration of Public Health Law.

§ 130-9. Powers and duties of the Department of Human Resources and Commission for Health Services.

Editor's Note. —

Session Laws 1977, c. 897, s. 2, effective March 1, 1979, amended subsection (e) of this section by adding a new subdivision (7), relating to community advisory committees. Session Laws 1977, 2nd Sess., c. 1192, s. 1, ratified June

16, 1978 and effective on ratification, amended s. 2 of the 1977 amendatory act so as to add to the General Statutes a new § 130-9.5, rather than adding a new subdivision (7) to subsection (e) of this section. See § 130-9.5 and the Editor's note thereto.

§ 130-9.5. Nursing home advisory committees. — (a) Statement of Purpose. — It is the purpose of the General Assembly that community advisory committees work to maintain the spirit of the Nursing Home Bill of Rights (Chapter 130, Article 30) within the nursing homes in this State. It is the further purpose of the General Assembly that the committees promote community involvement and cooperation with nursing homes and an integration of these homes into a system of care for the elderly.

(b) Establishment and Appointment of Committees. — A community advisory committee shall be established in each county which has a nursing home, shall serve all the homes in the county, and shall work with each home for the best interests of the persons residing in each home. In a county which has one, two, or three nursing homes, the committee shall have five members. In a county with four or more nursing homes, the committee shall have one additional member

for each nursing home in excess of three.

In each county with four or more nursing homes, the committee shall establish a subcommittee of five members from the committee for each nursing home in the county. Each member must serve on at least one subcommittee.

Each committee shall be appointed by the board of county commissioners. Of the members, a minority (not less than one third, but as close to one third as possible) must be chosen from among persons nominated by a majority of the chief administrators of nursing homes in the county. If the nursing home administrators fail to make a nomination within 45 days after written notification has been sent to them by the board of county commissioners requesting a nomination, such appointments may be made by the board of county commissioners without nominations.

(c) Terms of Office. — Each committee member shall serve an initial term of one year. Any person reappointed to a second or subsequent term in the same county shall serve a three-year term. Persons who were originally nominees of nursing home chief administrators, or who were appointed by the board of county commissioners when the nursing home administrators failed to make nominations may not be reappointed without the consent of a majority of the nursing home chief administrators within the county. If the nursing home chief administrators fail to approve or reject the reappointment within 45 days of being requested by the board of county commissioners, the commissioners may reappoint the member if they so choose.

(d) Vacancies. — Any vacancy shall be filled by appointment of a person for a one-year term. Any person replacing a member nominated by the chief administrators or a person appointed when the chief administrators failed to make a nomination shall be selected from among persons nominated by the administrators, as provided in subsection (b). If the county commissioners fail to appoint members to a committee, or fail to fill a vacancy, the appointment may be made or vacancy filled by the Secretary of Human Resources or the Secretary's designee no sooner than 45 days after the commissioners have been notified of the appointment or vacancy if nomination or approval of the nursing home administrators is not required. If nominations or approval of the nursing home administrators is required, the appointment may be made or vacancy filled by the Secretary of Human Resources or the Secretary's designee no sooner than 45 days after the commissioners have received the nomination or approval, or no sooner than 45 days after the nursing home administrators' 45-day period for action has expired.

(e) Officers. — The committee shall elect from its members a chairman, to serve a one-year term.

(f) Qualifications. — Each member must be a resident of the county which the committee serves. No person or immediate family member of a person with a financial interest in a home served by a committee, or employee or governing board member or immediate family member of an employee or governing board member of a home served by a committee, or immediate family member of a patient in a home served by a committee may be a member of a committee. Membership on a committee shall not be considered an office as defined in G.S. 128-1 or 128-1.1. Any county commissioner who is appointed to the committee shall be deemed to be serving on the committee in an ex officio capacity. Members of the committee shall serve without compensation, but may be reimbursed for the amount of actual expenses incurred by them in the performance of their duties. The names of the committee members and the date of expiration of their terms shall be filed with the Division of Aging, which shall supply a copy to the Division of Facilities Services.

(g) The Division of Aging, Department of Human Resources, shall develop training materials, which shall be distributed to each committee member and nursing home. Each committee member must receive training as specified by

the Division of Aging prior to exercising any power under subsection (h) of this section. The Division of Aging, Department of Human Resources, shall provide the committees with information, guidelines, training, and consultation to direct them in the performance of their duties.

(h) Duties. —

- (1) Each committee shall apprise itself of the general conditions under which the persons are residing in the homes, and shall work for the best interests of the persons in the homes. This may include assisting persons who have grievances with the home and facilitating the resolution of grievances at the local level.
- (2) Each committee shall quarterly visit the nursing home it serves. For each such official quarterly visit, a majority of the committee members shall be present. In addition, each committee may visit the nursing home it serves whenever it deems it necessary to carry out its duties. In counties with four or more nursing homes, the subcommittee assigned to a home shall perform the duties of the committee under this subdivision, and a majority of the subcommittee members must be present for any visit.
- (3) Each member of a committee shall have the right, between 10:00 a.m. and 8:00 p.m., to enter into the facility the committee serves in order to carry out the members' responsibilities. In a county where subcommittees have been established, a member shall have a right to enter only homes served by subcommittees of which he is a member.
- (4) The committee or subcommittee may, at any time it deems necessary, communicate through its chairman with the Department of Human Resources or any other agency in relation to the interest of any patient. The names of all complaining persons shall remain confidential unless written permission is given for disclosure.
- (5) Each home shall cooperate with the committee as it carries out its duties.
- (6) Before entering into any nursing home, the committee, subcommittee, or member shall identify itself to the person present at the facility who is in charge of the facility at that time.

(i) Nursing Homes to Cooperate. — In order for a nursing home as defined by G.S. 130-9(e) to be licensed under that subsection, the home shall cooperate with a community advisory committee. (1977, c. 897, s. 2; 1977, 2nd Sess., c. 1192, s. 1.)

Cross Reference. — See the Editor's note to § 130-9.

Editor's Note. — This section was added by Session Laws 1977, c. 897, s. 2, as amended by Session Laws 1977, 2nd Sess., c. 1192, s. 1. Session Laws 1977, c. 897, s. 2, prior to its amendment by the 1977, 2nd Sess., act, added a new subdivision (7) to subsection (e) of § 130-9.

Session Laws 1977, c. 897, s. 4, as amended by Session Laws 1977, 2nd Sess., c. 1192, s. 2, provides:

"The provisions of this act shall become effective January 1, 1978, except that G.S. 130-9.5(a) through G.S. 130-9.5(g), as proposed

by Section 2, shall take effect July 1, 1978, and G.S. 130-9.5(h) and (i), as proposed by Section 2, shall take effect March 1, 1979.

"Community advisory committees shall be appointed no later than January 1, 1979, in counties which have nursing homes prior to that date, and the initial terms of office of those committee members shall expire February 29, 1980."

Session Laws 1977, c. 897, s. 3, provides: "Nothing in this act shall be construed to interfere with the practice of medicine or the physician-patient relationship."

ARTICLE 9.

Immunization of Children against Certain Communicable Diseases.

§ 130-90. School admittance.

All children presently attending school in North Carolina are not required to be immunized against rubella as a requirement for continuance in school. All children enrolled in school for the first time in North Carolina after July 1, 1977, are required to be immunized

against rubella as a requirement for continuance in school. Opinion of Attorney General to Dr. J.N. MacCormack, Head, Communicable Disease Control Branch, Division of Health Services, 47 N.C.A.G. 130 (1977).

ARTICLE 13B.

Solid Waste Management.

§ 130-166.16. Definitions. — As used in this Article, the term:

- (1) "Disposal" means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste into or on any land so that such solid waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.
- (2) "Federal act" means the Resource Conservation and Recovery Act of 1976, P.L. 94-580, as amended.
- (3) "Garbage" means all putrescible wastes, including animal offal and carcasses, and recognizable industrial by-products, but excluding sewage and human waste.
- (4) "Hazardous waste," as determined by the Commission, means a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may:
 - a. Cause or significantly contribute to an increase in mortality or an increase in serious irreversible or incapacitating reversible illness; or
 - b. Pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.
- (5) "Hazardous waste facility" means a facility for the storage, collection, processing, treatment, recycling, recovery or disposal of hazardous waste.
- (6) "Hazardous waste generation" means the act or process of producing hazardous waste.
- (7) "Hazardous waste management" means the systematic control of the collection, source separation, storage, transportation, processing, treatment, recovery, and disposal of hazardous wastes.
- (8) "Manifest" means the form used for identifying the quantity, composition, and the origin, routing, and destination of hazardous waste during its transportation from the point of generation to the point of disposal, treatment, or storage.
- (9) "Natural resources" means all materials which have useful physical or chemical properties which exist, unused, in nature.
- (10) "Open dump" means a solid waste disposal site which is not a sanitary landfill.
- (10a) "Person" means an individual, corporation, company, association, partnership, unit of local government, or other legal entity.
- (11) "Recycling" means the process by which recovered resources are transformed into new products in such a manner that the original products lose their identity.

- (12) "Refuse" means all nonputrescible waste.
- (13) "Resource recovery" means the process of obtaining material or energy resources from discarded solid waste which no longer has any useful life in its present form and preparing such solid waste for recycling.
- (14) "Sanitary landfill" means a facility for disposal of solid waste on land in a sanitary manner in accordance with the rules concerning sanitary landfills promulgated under this Article.
- (15) "Sludge" means any solid, semisolid or liquid waste generated from a municipal, commercial, institutional, or industrial wastewater treatment plant, water supply treatment plant, or air pollution control facility or any other such waste having similar characteristics and effects.
- (16) "Solid waste" means any hazardous or nonhazardous garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, institutional, commercial, and agricultural operations, and from community activities. Such term does not include:
- a. Fowl and animal fecal waste;
 - b. Solid or dissolved material in
 1. Domestic sewage and sludges generated by the treatment thereof in sanitary sewage disposal systems which have a design capacity of more than 3000 gallons or which discharge effluents to the surface waters;
 2. Irrigation return flows; and
 3. Wastewater discharges and the sludges incidental thereto and generated by the treatment thereof which are point sources subject to permits granted under Section 402 of the Federal Water Pollution Control Act, as amended (PL 92-500), and permits granted under G.S. 143-215.1 by the Environmental Management Commission; or
 - c. Oils and other liquid hydrocarbons controlled under Article 21A of Chapter 143 of the North Carolina General Statutes;
 - d. Any radioactive material as defined by the North Carolina Radiation Protection Act, G.S. 104E-1 through G.S. 104E-23; or
 - e. Mining refuse covered by the North Carolina Mining Act, G.S. 74-46 through G.S. 74-68 and regulated by the North Carolina Mining Commission (as defined under G.S. 143B-290).
- (17) "Solid waste disposal site" means any place at which solid wastes are disposed of by incineration, sanitary landfill or any other method.
- (18) "Solid waste generation" means the act or process of producing solid waste.
- (19) "Solid waste management" means purposeful, systematic control of the generation, storage, collection, transport, separation, treatment, processing, recycling, recovery and disposal of solid waste.
- (20) "Solid waste management facility" means land, personnel and equipment used in the management of solid waste.
- (21) "Storage" means the containment of solid waste, either on a temporary basis or for a period of years, in such a manner as not to constitute disposal.
- (22) "Treatment" means any method, technique, or process, including neutralization, designed to change the physical, chemical or biological character or composition of any solid waste so as to neutralize such waste or so as to render such waste nonhazardous, safer for transport, amenable for recovery, amenable for storage, or reduced in volume.

Such term includes any activity or processing designed to change the physical form or chemical composition of solid waste so as to render it nonhazardous. (1969, c. 899; 1975, c. 311, s. 2; 1977, 2nd Sess., c. 1216.)

Revision of Article. — Session Laws 1977, 2nd Sess., c. 1216, revised and rewrote this Article, substituting present §§ 130-166.16 through 130-166.21D for former §§ 130-166.16 through 130-166.21. Sections 130-166.21E and 130-166.21F were added by Session Laws 1977,

2nd Sess., c. 1205. No attempt has been made to point out the changes effected by the revision; however, where appropriate, the historical citations to the old sections have been added to corresponding sections in the revised Article.

§ 130-166.17. Solid waste unit in Department of Human Resources. — For the purpose of promoting and preserving an environment that is conducive to public health and welfare, and preventing the creation of nuisances and the depletion of our natural resources, the Department of Human Resources shall maintain an appropriate administrative unit to promote sanitary processing, treatment, disposal, and overall management of solid waste and the greatest possible recycling and recovery of resources, and the Department shall employ and retain such qualified personnel as may be necessary. To the extent necessary, practicable and appropriate, the Department shall consult and coordinate with other State agencies, units of local government, the federal government, industries and individuals in the promotion of sanitary processing, treatment, disposal and overall management of solid waste and the recycling and recovery of resources. (1969, c. 899; 1973, c. 476, s. 128; 1975, c. 311, s. 3; 1977, 2nd Sess., c. 1216.)

§ 130-166.18. Solid waste management program. — (a) The Department of Human Resources is authorized and directed to engage in research, conduct investigations and surveys, make inspections, and establish a statewide solid waste management program. In establishing a program, the Department shall have authority to:

- (1) Develop a comprehensive program for implementation of safe and sanitary practices for management of solid waste;
- (2) Advise, consult, cooperate, and contract with other State agencies, units of local government, the federal government, industries and individuals in the formulation and carrying out of a solid waste management program;
- (3) Develop and promulgate standards for qualification as a "recycling or resource recovering facility" or as "recycling or resource recovering equipment" for the purpose of special tax classifications or treatments, and to certify as qualifying those applicants which meet the established standards. The standards shall be so developed as to qualify only those facilities and equipment exclusively used in the actual resource recovering or recycling process and shall exclude any incidental or supportive facilities and equipment; and
- (4) Develop a permit system governing the establishment and operation of solid waste management facilities. In connection with the above, no such permit shall be granted for a solid waste management facility having discharges which are point sources, until the Department of Human Resources has referred the complete plans and specifications to the Environmental Management Commission and has received advice in writing that the same are approved in accordance with the provisions of G.S. 143-215.1. In any case where the Department of Human Resources denies a permit for a solid waste management facility, it shall state in writing the reason for such denial and shall also state its estimate of the changes in the applicant's proposed activities or plans which will be required in order that the applicant may obtain a permit.

(5) Delegate authority and responsibility to local governments, including counties, to perform all or any portion of a solid waste management program within the jurisdictional area of the local government; provided, that no authority over or control of the operations or properties of one local government shall be delegated to any other local government.

(b) The Commission shall promulgate and the Department shall enforce rules for the establishment, location, operation, maintenance, use and discontinuance of solid waste management sites and facilities. Such rules shall be designed to accomplish the maintenance of safe and sanitary conditions in and around solid waste management sites and facilities, and shall be based on recognized public health practices and procedures, sanitary engineering research and studies, and current technological development in equipment and methods. Such rules shall not apply to the management of solid waste accumulated by an individual or individual family or household unit and disposed of on his own property.

(c) The Commission shall promulgate and the Department shall enforce rules concerning the management of hazardous waste. Such rules shall provide for:

- (1) Establishing criteria for hazardous wastes, identifying the characteristics of hazardous waste and listing particular hazardous wastes;
- (2) Record-keeping and reporting by generators and transporters of hazardous waste and owners and operators of hazardous waste facilities;
- (3) Proper labeling of hazardous waste containers;
- (4) Use of appropriate containers for hazardous waste;
- (5) A manifest system to assure that all hazardous waste is designated for treatment, storage or disposal at a hazardous waste facility to which a permit has been issued;
- (6) Proper transportation of hazardous waste;
- (7) Treatment, storage and disposal standards of performance and techniques to be used by hazardous waste facilities;
- (8) Location, design, ownership and construction of hazardous waste facilities;
- (9) Plans to minimize unanticipated damage from any treatment, storage or disposal of hazardous waste; and a plan or plans providing for the establishment and/or operation of one or more hazardous waste facilities in the absence of adequate approved hazardous waste facilities established or operated by any person within the State;
- (10) Proper maintenance and operation of hazardous waste facilities, including requirements for ownership (including ownership by any person or the State), financial responsibility, training of personnel, continuity of operation and procedures for establishing and maintaining hazardous waste facilities;
- (11) Monitoring by owners or operators of hazardous waste facilities;
- (12) Inspection or copying of records required to be kept;
- (13) Obtaining and analyzing hazardous waste samples and samples of hazardous waste containers and labels from generators and transporters and from owners and operators of hazardous waste facilities;
- (14) A permit system governing the establishment and operation of hazardous waste facilities; and
- (15) Such additional requirements as may be necessary for the effective management of hazardous waste.

(d) The Commission shall have the authority to promulgate and the Department shall have the authority to enforce rules where appropriate for public participation in the development, revision, implementation and

enforcement of any regulation, guideline, information or program under this Article.

(e) The rules promulgated under this section shall be no less stringent than the most recent regulations promulgated under the federal act and may be amended from time to time as necessary. (1969, c. 899; 1973, c. 476, s. 128; 1975, c. 311, s. 4; c. 764, s. 1; 1977, c. 123; 1977, 2nd Sess., c. 1216.)

§ 130-166.19. Receipt and distribution of funds. — The Department may accept loans and grants from the federal government and other sources for carrying out the purposes of this Article, and shall adopt reasonable policies governing the administration and distribution of such funds to units of local government, other State agencies, and private agencies, institutions or individuals for studies, investigations, demonstrations, surveys, planning, training, and construction or establishment of solid waste management facilities. (1969, c. 899; 1973, c. 476, s. 128; 1977, 2nd Sess., c. 1216.)

§ 130-166.20. Single agency designation. — The Department is hereby designated as the single State agency for purposes of the federal act or any State or federal legislation which has been or may be enacted to promote the proper management of solid waste. (1969, c. 899; 1973, c. 476, s. 128; 1977, 2nd Sess., c. 1216.)

§ 130-166.20A. Effect on laws applicable to water pollution control. — This Article shall not be construed as amending, repealing or in any manner abridging or interfering with those sections of the General Statutes of North Carolina relative to the control of water pollution as now administered by the Environmental Management Commission nor shall the provisions of this Article be construed as being applicable to or in any way affecting the authority of the Environmental Management Commission to control the discharges of wastes to the waters of the State as provided in Articles 21 and 21A, Chapter 143, of the General Statutes of North Carolina. (1977, 2nd Sess., c. 1216.)

§ 130-166.21. Recordation of sanitary landfill site permits. — (a) Whenever the Department of Human Resources approves a sanitary landfill site, the owner of the landfill site shall be granted both an original permit and a copy certified by the Secretary or his authorized representative. The permit shall include a legal description of the landfill site which would be sufficient as a description in an instrument of conveyance.

(b) Any person granted a sanitary landfill site permit shall file the certified copy of such permit in the register of deeds' office in the county or counties in which the landfill is located.

(c) The register of deeds shall record the certified copy and index it in the grantor index under the name of the owner of the landfill site.

(d) The permit shall not be effective unless the certified copy is filed as required under subsection (b). (1973, c. 444; c. 476, s. 128; 1977, 2nd Sess., c. 1216.)

§ 130-166.21A. Sludge deposits at sanitary landfills. — Sludges generated by the treatment of wastewater discharges which are point sources subject to permits granted under Section 402 of the Federal Water Pollution Control Act, as amended (PL 92-500), or permits generated under G.S. 143-215.1 by the Environmental Management Commission shall not be deposited in or on a sanitary landfill permitted hereunder unless in compliance with the rules concerning solid waste promulgated under this Article. (1977, 2nd Sess., c. 1216.)

§ 130-166.21B. Imminent hazard. — (a) An imminent hazard shall exist when in the judgment of the Secretary, as supported by findings of fact made by the Secretary, a condition exists in the State concerning solid waste which poses a serious, immediate risk to public health.

(b) In order to eliminate an imminent hazard, the Secretary may, without notice or hearing, issue an order requiring that immediate action be taken to protect the public health. Such order may be directed to a generator or transporter of solid waste or to the owner or operator of a solid waste management facility. (1977, 2nd Sess., c. 1216.)

§ 130-166.21C. Information received pursuant to this Article. — (a) For the purposes of this Article, upon a showing satisfactory to the Department or any authorized representative of the Department by any person that records, reports or information or particular part thereof, to which the Department or any authorized representative of the Department has access under G.S. 130-204, would divulge information entitled to protection under subsection (b), the Department shall consider such information or particular portion thereof confidential in accordance with the purposes of that subsection, except that such record, report, document or information may be disclosed to other officers, employees or authorized representatives of the Department concerned with carrying out this Article, or when relevant in any proceeding under this Article.

(b) For the purposes of this Article, whoever being an officer or employee of the Department publishes, divulges, discloses or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with the Department or any authorized representative of the Department which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided in subsection (a) shall be guilty of a misdemeanor and fined not more than five hundred dollars (\$500.00) or imprisoned not more than two years or both; and shall be removed from office or employment. (1977, 2nd Sess., c. 1216.)

§ 130-166.21D. Construction. — (a) This Article shall be interpreted as enabling the State to obtain federal financial assistance in carrying out its solid waste management program and to obtain the authority needed to assume primary enforcement responsibility for that portion of the solid waste management program concerning the management of hazardous waste.

(b) That portion of the solid waste management program concerning hazardous waste maintained by the State under this Article shall be no more comprehensive than the hazardous waste program prescribed under the federal act and that the rules, regulations and standards promulgated hereunder shall:

- (1) Be no more stringent than the rules, regulations and standards concerning hazardous waste prescribed under the federal act; and
- (2) Not become effective prior to the effective date of the rules, regulations and standards concerning hazardous waste prescribed under the federal act.

Any rules, regulations, policy guidelines or opinions rendered under this bill, relating to Article 13B, shall be reviewed by the proper committees of the next regular session of the General Assembly. (1977, 2nd Sess., c. 1216.)

§ 130-166.21E. Penalties; remedies. — (a) The Department may impose an administrative penalty on any person:

- (1) Who fails to comply with this Article, any order issued hereunder, or the solid waste management rules, or
- (2) Who refuses to allow an authorized representative of the Commission for Health Services, any local board of health, or the Department of Human Resources a right of entry as provided for in G.S. 130-204.

(b) Each day of a continued violation shall constitute a separate violation. Such penalty shall not exceed five hundred dollars (\$500.00) per day in the case of a violation involving nonhazardous waste. Such penalty shall not exceed one thousand dollars (\$1,000) per day in the case of a violation involving hazardous waste. In determining the amount of the penalty, the Department shall consider the degrees and extent of the harm caused by the violation and the cost of rectifying the damage. Any person assessed a penalty shall be notified of the assessment by registered or certified mail, and the notice shall specify the reasons for the assessment.

(c) Any person wishing to contest a penalty or other order issued under this Article shall be entitled to an administrative hearing and judicial review conducted according to the procedures outlined in G.S. 150A-23 through 150A-52.

(d) The Secretary may bring a civil action in the superior court of the county in which the violation is alleged to have occurred to recover the amount of the administrative penalty whenever a person:

(1) Who has not requested an administrative hearing fails to pay the penalty within 60 days after being notified of such penalty, or

(2) Who has requested an administrative hearing fails to pay the penalty within 60 days after service of a written copy of the decision as provided in G.S. 150A-36.

(e) The Department may promulgate rules concerning the imposition of civil penalties under this section.

(f) In addition to any other remedies provided for in this section, the Secretary may institute a civil action in the superior court of the county in which the defendant in said civil action resides for injunctive relief to prevent a threatened or continuing violation of any provision of this Article or any order or regulation issued pursuant to this Article. (1977, 2nd Sess., c. 1205, s. 1.)

§ 130-166.21F. Sections 130-203 and 130-205 inapplicable. — G.S. 130-203 and 130-305 [130-205] shall be inapplicable to this Article. (1977, 2nd Sess., c. 1205, s. 2.)

ARTICLE 15A.

Home Health Agencies.

§ 130-170.2. Home health services to be provided in all counties. — (a) Every county shall provide home health services as defined in G.S. 130-170.1(a).

(b) For the purpose of this section, home health services shall be as defined in G.S. 130-170.1(a), except that such services may be provided by any organization listed in subsection (c) of this section.

(c) Home health services may be provided by a county health department, by a district health department, by a home health agency licensed under G.S. 130-170.1, or by a public agency. The county may provide home health services by contract with another health department, or with a home health agency or public agency in another county.

(d) The provisions of this section shall not apply to the counties of Bladen, Hyde, Jones, and Pamlico until January 1, 1980. (1977, 2nd Sess., c. 1184.)

Editor's Note. — Session Laws 1977, 2nd Sess., c. 1184, s. 3, makes the act effective Jan. 1, 1979.

ARTICLE 21.

Postmortem Medicolegal Examinations.

§ 130-199. Duties of medical examiners upon receipt of notice; reports; fees. — Upon receipt of such notice the medical examiner shall take charge of the dead body, make inquiries regarding the cause and manner of death, reduce his findings to writing, and promptly make a full report thereof to the Secretary of Human Resources on forms prescribed for such purpose, retaining one copy of such report for his own, delivering copies to the district solicitor of the superior court, and upon request to a defendant in a criminal action, of any party in a civil action. Full directions as to the nature, character and extent of the investigation to be made in such cases shall be furnished the medical examiner by the Secretary of Human Resources, together with appropriate forms for the required reports and instructions for their use. For each investigation under this Article, including the making of the required reports, the medical examiner shall receive a fee to be paid by the State unless the deceased is a legal resident of the county in which his death occurred, in which event such county shall be responsible for the fee. The fee shall be in an amount determined by the Secretary to be reasonable and appropriate but not to exceed fifty dollars (\$50.00). The medical examiner is authorized to issue subpoenas for any person or persons to appear during the investigation. (1955, c. 972, s. 1; 1957, c. 1357, s. 1; 1967, c. 1154, s. 1; 1973, c. 476, s. 128; 1977, 2nd Sess., c. 1145.)

Editor's Note. —

The 1977, 2nd Sess., amendment deleted "of twenty five dollars (\$25.00)," following "fee" in

the third sentence and added the fourth sentence.

ARTICLE 22.

*Remedies.***§ 130-203. Penalties.**

Cross Reference. — For provision that this section shall be inapplicable to Article 13B of this Chapter, see § 130-166.21F.

§ 130-205. Injunction.

Cross Reference. — For provision that this section shall be inapplicable to Article 13B of this Chapter, see § 130-166.21F.

ARTICLE 30.

*Nursing Home Patients' Bill of Rights.***§ 130-264. Legislative intent.**

Editor's Note. — Session Laws 1977, c. 897, s. 4, as amended by Session Laws 1977, 2nd Sess., c. 1192, s. 2, makes this Article effective Jan. 1, 1978.

§§ 130-278 to 130-282: Reserved for future codification purposes.

ARTICLE 31.

Glaucoma and Diabetes Program.

§ 130-283. Department of Human Resources to establish program. — The Department of Human Resources, hereinafter referred to as Department, shall establish a program for the detection and control of glaucoma and diabetes which would complement and assist existing community resources. This program shall emphasize detection and control among high risk groups. This program shall also assist those persons who are unable to pay for such services, but will not duplicate payment by other existing program. (1977, 2nd Sess., c. 1257, s. 1.)

Editor's Note. — Session Laws 1977, 2nd Sess., c. 1257, s. 3, makes the act effective July 1, 1978.

§ 130-284. Powers and duties of the Department. — The Department shall:

- (1) Provide for education of health care personnel and patients in the detection, control and treatment of glaucoma and diabetes;
- (2) Develop and expand programs for the detection and control of glaucoma and diabetes including insuring uniform high quality of public clinical services, examinations, treatment, laboratory services, follow-up and evaluation services, and educational services;
- (3) Provide supplies, equipment, and medication for detection and control of glaucoma and diabetes;
- (4) Cooperate with and accept assistance from any group or organization for the accomplishment of the purposes of this Article. (1977, 2nd Sess., c. 1257, s. 1.)

§ 130-285. Rules and regulations. — The Department of Human Resources shall develop and adopt policies to implement the provisions of this Article. (1977, 2nd Sess., c. 1257, s. 1.)

Chapter 131.**Public Hospitals.****Article 17.**

Sec. Medical Review Committee.
131-170 to 131-174. [Reserved.]

Article 18.**Certificate of Need Law.**

131-175. Findings of fact.
131-176. Definitions.
131-177. Department of Human Resources is designated State Health Planning and Development Agency; powers and duties.

Sec.

131-178. Services and facilities requiring certificates of need.
131-179. Nature and incidents of certificate of need; rules of Department.
131-180. Application.
131-181. Review criteria.
131-182. Review process.
131-183. Final decision.
131-184. Written notice of decision.
131-185. Rights of appeal and judicial review.
131-186. Forfeiture of certificate of need.
131-187. Enforcement and sanctions.
131-188. Venue.

ARTICLE 2.*Hospitals in Counties, Townships, and Towns.***§ 131-4. Establishment of public hospitals; election, tax, and bond issue.**

Constitutionality. — The statutory scheme set forth in this Article is a constitutional delegation of authority for a board of county commissioners to assume the role of “governing body” for the purpose of implementing that enabling legislation, including the levying of a

tax to support a township hospital. *Arnold v. Varum*, 34 N.C. App. 22, 237 S.E.2d 272 (1977).

This Article is clearly a general law. *Arnold v. Varum*, 34 N.C. App. 22, 237 S.E.2d 272 (1977).

§ 131-7. Trustees; term of office; qualification and election.

Local Modification. — Johnston: 1977, 2nd Sess., c. 1151.

ARTICLE 17.*Medical Review Committee.*

§§ 131-170 to 131-174: Reserved for future codification purposes.

ARTICLE 18.*Certificate of Need Law.*

§ 131-175. Findings of fact. — The General Assembly of North Carolina makes the following findings:

- (1) That, because of the manner in which health care is financed, the forces of free market competition are largely absent and that government regulation is therefore necessary to control the cost, utilization, and distribution of health services.
- (2) That the continuously increasing cost of health care services threatens the health and welfare of the citizens of this State in that citizens need assurance of economical, and readily available health care.
- (3) That the current system of planning for health care facilities and equipment has led to the proliferation of new inpatient acute care facilities and medical equipment beyond the need of many localities in

this State and an inadequate supply of health personnel and of resources for long term, intermediate, and ambulatory care in many localities.

- (4) That this trend of proliferation of unnecessary health care facilities and equipment results in costly duplication and underuse of facilities, with the availability of excess capacity leading to unnecessary use of expensive resources and overutilization of acute care hospital services by physicians.
- (5) That a certificate of need law is required by P.L. 93-641 as a condition for receipt of federal funds. If these funds were withdrawn the State of North Carolina would lose in excess of fifty-five million dollars (\$55,000,000).
- (6) That excess capacity of health facilities places an enormous economic burden on the public who pay for the construction and operation of these facilities as patients, health insurance subscribers, health plan contributors, and taxpayers.
- (7) That the general welfare and protection of lives, health, and property of the people of this State require that new institutional health services to be offered within this State be subject to review and evaluation as to type, level, quality of care, feasibility, and other criteria as determined by provisions of this Article or by the North Carolina Department of Human Resources pursuant to provisions of this Article prior to such services being offered or developed in order that only appropriate and needed institutional health services are made available in the area to be served. (1977, 2nd Sess., c. 1182, s. 2.)

Editor's Note. — Session Laws 1977, 2nd Sess., c. 1182, s. 4, makes the act effective Jan. 1, 1979, and further provides:

"This act shall not apply to any project which has received approval under the Section 1122, P.L. 92-603 program prior to January 1, 1979, as long as construction has commenced before January 1, 1980.

"This act shall not apply to any project for which application is made under the Section 1122, P.L. 92-603 program between July 1, 1978, and January 1, 1979, if such application is

approved, and construction has commenced before January 1, 1980.

"Rules and Regulations under this act may be issued at any time after the date of ratification of this act [June 16, 1978], but shall not become effective prior to January 1, 1979."

Session Laws 1977, 2nd Sess., c. 1182, s. 1, provides: "This act may be cited as the North Carolina Health Planning and Resource Development Act of 1978."

Session Laws 1977, 2nd Sess., c. 1182, s. 3, contains a severability clause.

§ 131-176. Definitions. — As used in this Article, unless the context clearly requires otherwise, the following terms have the meanings specified:

- (1) "Ambulatory surgical facility" means a public or private facility, not a part of a hospital, which provides surgical treatment to patients not requiring hospitalization. Such term does not include the offices of private physicians or dentists, whether for individual or group practice.
- (2) "Bed capacity" means space used exclusively for inpatient care, including space designed or remodeled for licensed inpatient beds even though temporarily not used for such purposes. The number of beds to be counted in any patient room shall be the maximum number for which adequate square footage is provided as established by regulations of the Department except that single beds in single rooms are counted even if the room contains inadequate square footage.
- (3) "Certificate of need" means a written order of the Department setting forth the affirmative finding that a proposed project sufficiently satisfies the plans, standards, and criteria prescribed for such projects by this Article and by rules and regulations of the Department as provided in G.S. 131-181(a) and which affords the person so designated

- as the legal proponent of the proposed project the opportunity to proceed with the development of such project.
- (4) "Certified cost estimate" means an estimate of the total cost of a project certified by the proponent of the project within 60 days prior to or subsequent to the date of submission of the proposed new institutional health service to the Department and which is based on:
- Preliminary plans and specifications,
 - Estimates of the cost of equipment certified by the manufacturer or vendor, and
 - Estimates of the cost of management and administration of the project.
- (5) "Change of ownership" means the transfer by purchase, lease or comparable arrangements of the controlling interest of a capital asset or capital stock, or voting rights of a corporation, from one person to another. Such transfer is deemed to occur when fifty percent (50%) or more of an existing capital asset or capital stock or voting rights of a corporation is purchased, leased or acquired by comparable arrangement by one person from another person.
- (6) "Commencement of construction" means that all of the following have been completed with respect to a project:
- A written contract executed between the applicant and a licensed contractor to construct and complete the project within a designated time schedule in accordance with final architectural plans;
 - Required initial permits and approvals for commencing work on the project have been issued by responsible governmental agencies; and
 - Actual construction work on the project has started and a progress payment has been made by the applicant to the licensed contractor under terms of the construction contract.
- (7) "Department" means the North Carolina Department of Human Resources.
- (8) To "develop" when used in connection with health services, means to undertake those activities which will result in the offering of institutional health service not provided in the previous 12-month reporting period or the incurring of a financial obligation in relation to the offering of such a service.
- (9) "Final decision" means an approval, a denial, an approval with conditions, or a deferral.
- (10) "Health care facility" means hospitals; psychiatric hospitals; tuberculosis hospitals; skilled nursing facilities; kidney disease treatment centers, including free-standing hemodialysis units; intermediate care facilities; ambulatory surgical facilities; health maintenance organizations; home health agencies; and diagnostic or therapeutic equipment with a value in excess of one hundred fifty thousand dollars (\$150,000) purchased or leased by a "person," as defined in this section. "Health care facility" does not include a facility operated solely as part of the private medical practice of (i) an independent practitioner, (ii) a partnership, or (iii) a professional medical corporation, except with respect to acquisitions of diagnostic or therapeutic equipment with a value in excess of one hundred fifty thousand dollars (\$150,000) if with respect to such acquisition either:
- The notice required by G.S. 131-178(e) is not filed in accordance with that paragraph with respect to such acquisition, or
 - The Department finds, within 30 days after the date it receives a notice in accordance with G.S. 131-178(e) with respect to such

acquisition, that the equipment will be used to provide services for inpatients of a hospital.

- (11) "Health maintenance organization (HMO)" means a public or private organization which:
- Provides or otherwise makes available to enrolled participants health care services, including at least the following basic health care services: usual physician services, hospitalization, laboratory, X ray, emergency and preventive services, and out-of-area coverage;
 - Is compensated, except for copayments, for the provision of the basic health care services listed in paragraph a of this subdivision to enrolled participants on a predetermined periodic rate basis; and
 - Provides physicians' services primarily (i) directly through physicians who are either employees or partners of such organization, or (ii) through arrangements with individuals physicians or one or more groups of physicians organized on a group practice or individual practice basis.
- (12) "Health systems agency" means an agency, as defined by P.L. 93-641, as amended, and rules and regulations implementing that act.
- (13) "Home health agencies" means a private organization or public agency, whether owned or operated by one or more persons or legal entities, which furnishes or offers to furnish home health services.
- "Home health services" means items and services furnished to an individual by a home health agency, or by others under arrangements with such others made by the agency, on a visiting basis, and except for paragraph e of this subdivision, in a place of temporary or permanent residence used as the individual's home as follows:
- Part-time or intermittent nursing care provided by or under the supervision of a registered nurse;
 - Physical, occupational or speech therapy;
 - Medical social services, home health aid services, and other therapeutic services;
 - Medical supplies, other than drugs and biologicals, and the use of medical appliances;
 - Any of the foregoing items and services which are provided on an outpatient basis under arrangements made by the home health agency at a hospital or nursing home facility or rehabilitation center and the furnishing of which involves the use of equipment of such a nature that the items and services cannot readily be made available to the individual in his home, or which are furnished at such facility while he is there to receive any such item or service, but not including transportation of the individual in connection with any such item or service.
- (14) "Hospital" means a public or private institution which is primarily engaged in providing to inpatients, by or under supervision of physicians, diagnostic services and therapeutic services for medical diagnosis, treatment, and care of injured, disabled, or sick persons, or rehabilitation services for the rehabilitation of injured, disabled, or sick persons. Such term does not include psychiatric hospitals, as defined in subdivision (22) of this section, or tuberculosis hospitals, as defined in subdivision (27) of this section.
- (15) To "incur a financial obligation in relation to the offering of a new institutional health service" means that in establishing a new institutional health service a person must fulfill the following performance requirements relative to but not limited to the following types of projects:

- a. New construction or renovation project:
 1. Has acquired title or long-term lease to the appropriate site; and
 2. Has entered into an enforceable construction contract specifying price and date for commencement of construction within 120 days from the date the contract is entered into; and
 3. Has filed with the appropriate State agency and received approval on the complete set of schematic drawings for the project; and
 4. Has obtained a financial commitment, including an enforceable offer and acceptance from a financial institution to provide adequate capital financing for the project.
 - b. Acquisition of equipment: The equipment must either be purchased, [or] the lease agreement must be entered into by the proponent, or if acquired by a comparable arrangement the proponent must have possession of the equipment;
 - c. Change of ownership by lease or purchase or comparable arrangement:
 1. The lease must be entered into; or
 2. The title to the property or stock must be in the possession of the proponent.
- (16) "Intermediate care facility" means a public or private institution which provides, on a regular basis, health-related care and services to individuals who do not require the degree of care and treatment which a hospital or skilled nursing facility is designed to provide, but who because of their mental or physical condition require health-related care and services above the level of room and board.
- (17) "New institutional health services" means:
- a. The construction, development, or other establishment of a new health care facility;
 - b. Any expenditure by or on behalf of a health care facility in excess of one hundred fifty thousand dollars (\$150,000) which, under generally accepted accounting principles consistently applied, is a capital expenditure; except that this Article shall not apply to expenditures solely for the termination or reduction of beds or of a health service, but shall apply to expenditures for site acquisitions and acquisition of existing health care facilities. Where a person makes an acquisition by or on behalf of a health care facility under lease or comparable arrangement, or through donation, which would have required review if the acquisition had been by purchase, such acquisition shall be deemed a capital expenditure subject to review. The value of the transaction shall be deemed to be the fair market value of the asset and not necessarily the actual dollar amount of the transaction. Donations shall include bequests. A change in a proposed capital expenditure project which in itself meets the criteria set forth herein shall be considered a capital expenditure, as well as a change in ownership of in excess of fifty percent (50%) of an existing health care facility or the acquisition of in excess of fifty percent (50%) of the assets or capital stock of a health care facility.
 - c. A change in bed capacity of a health care facility which increases the total number of beds, or which distributes beds among various categories, subject to the provisions of paragraph j of this subdivision, or relocates such beds from one physical facility or site to another. Such bed capacity change is subject to review regardless of whether a capital expenditure is made;
 - d. Health services, including home health services, which are offered

in or through a health care facility and which were not offered on a regular basis in or through such health care facility within the 12-month period prior to the time such services would be offered;

- e. A formal internal commitment of funds by a facility for a project undertaken by the facility as its own contractor;
- f. Any expenditure by or on behalf of a health care facility in excess of one hundred fifty thousand dollars (\$150,000) made in preparation for the offering or development of a new institutional health service and any arrangement or commitment made for financing the offering or development of a new institutional health service;
- g. Any conversion or upgrading of a facility such that it is converted from a type of facility not covered by this Article to any of the types of health care facilities which are covered by this Article as defined in this section;
- h. A project which substantially expands a service currently offered or which provides a service not offered in the previous 12-month reporting period by the facility, including a change in type of license of five or more beds, subject to the provisions of paragraph j of this subdivision. Such substantial change of service is subject to review regardless of whether a capital expenditure is made;
- i. The purchase or lease by a person or health care facility of diagnostic or therapeutic equipment, regardless of location, with a value in excess of one hundred fifty thousand dollars (\$150,000), except it shall not include purchase or lease of such equipment with a value in excess of one hundred fifty thousand dollars (\$150,000) for use in a facility operated solely as part of the private medical practice of (i) an independent practitioner, (ii) a partnership, or (iii) a professional medical corporation unless either,
 - 1. The notice required by G.S. 131-178(e) is not filed in accordance with that subsection, or
 - 2. The Department finds, within 30 days after it receives a notice under G.S. 131-178(e), that the equipment will be used to provide services for inpatients of a hospital;
- j. The Department of Human Resources is authorized and empowered to adopt rules and regulations, consistent with P.L. 93-641, and federal rules and regulations adopted pursuant to said P.L. 93-641, to permit the interchange of skilled nursing and intermediate care beds within the same health care facility to the maximum degree, extent or number permitted from time to time by said federal rules and regulations without requiring a new certificate of need.

For purposes of this subdivision, the acquisition of one or more items of functionally related diagnostic or therapeutic equipment shall be considered as one project. Purchase or lease shall include purchases, contracts, encumbrances of funds, lease arrangements, conditional sales or a comparable arrangement that purports to be a transfer of ownership in whole or in part. Diagnostic or therapeutic equipment shall include units of equipment and all accessories functionally related and used in the diagnosis and treatment of patients, excluding mechanical and electrical equipment related to basic operation and maintenance of the facility. Functionally related means that pieces of equipment are interdependent to the extent that one piece of equipment is unable to function in the absence of or without the functioning piece, or that one piece of equipment performs the same function as another piece, or that pieces of equipment are normally used together in the provision of a single health care facility service.

(18) "North Carolina State Health Coordinating Council" means the Council

- as defined by P.L. 93-641, as amended, and rules and regulations implementing that act.
- (19) To "offer," when used in connection with health services, means that the health care facility or health maintenance organization holds itself out as capable of providing, or as having the means for the provision of, specified health services.
 - (20) "Person" means an individual, a trust or estate, a partnership, a corporation, including associations, joint stock companies, and insurance companies; the State, or a political subdivision or agency or instrumentality of the State.
 - (21) "Project" or "capital expenditure project" means a proposal to undertake a capital expenditure that results in the offering of a new institutional health service as defined by this Article. A project, or capital expenditure project, or proposed project may refer to the project from its earliest planning stages up through the point at which the specified new institutional health service may be offered. In the case of facility construction, the point at which the new institutional health service may be offered must take place after the facility is capable of being fully licensed and operated for its intended use, and at that time it shall be considered a health care facility.
 - (22) "Psychiatric hospital" means a public or private institution which is primarily engaged in providing to inpatients, by or under the supervision of a physician, psychiatric services for the diagnosis and treatment of mentally ill persons.
 - (23) "Skilled nursing facility" means a public or private institution or a distinct part of an institution which is primarily engaged in providing to inpatients skilled nursing care and related services for patients who require medical or nursing care, or rehabilitation services for the rehabilitation of injured, disabled, or sick persons.
 - (24) "State Health Plan" means the plan required by P.L. 93-641, as amended, and rules and regulations implementing that act.
 - (25) "State Medical Facilities Plan" means a plan prepared by the Department of Human Resources and the North Carolina State Health Coordinating Council, as required by P.L. 93-641, as amended, and rules and regulations implementing that act.
 - (26) "State Mental Health Plan" means the plan prepared by the Department of Human Resources under P.L. 94-63 for the purposes of providing an inventory of existing mental health and mental retardation services, and of establishing priorities for the development of new services to adequately meet the identified needs.
 - (27) "Tuberculosis hospital" means a public or private institution which is primarily engaged in providing to inpatients, by or under the supervision of a physician, medical services for the diagnosis and treatment of tuberculosis.
 - (28) "Undertake," with reference to a project or capital expenditure project, means:
 - a. Constructing, remodeling, installing, or proceeding with a project or any part of a project which exceeds one hundred fifty thousand dollars (\$150,000) in the current fiscal year or can exceed a total of one hundred fifty thousand dollars (\$150,000) in three consecutive fiscal years;
 - b. The expenditure or commitment of funds, which exceeds one hundred fifty thousand dollars (\$150,000) in the current fiscal year or can exceed a total of one hundred fifty thousand dollars (\$150,000) in three subsequent fiscal years, for a project which shall include but not be limited to:

1. Construction and financing of the project;
 2. Equipment orders, purchases, leases or acquisition through other comparable arrangements or donations;
 3. Development of studies, surveys, reports, working drawings, plans and specifications;
 4. Acquisitions, purchases, leases, or contracts for necessary developmental services respecting an existing or proposed health facility;
 5. Promotion, sponsorship, solicitation or representation or holding out to the public for donations or a fund raising drive for a specified project;
 6. Obtaining or securing bonds for a specified project;
 7. Executing contracts for the project;
 8. Cost of legal fees.
- c. The expenditure or commitment of funds to develop applications, studies, reports, schematics, long-range planning or preliminary plans and specifications certified to cost one hundred fifty thousand dollars (\$150,000) or less shall not be considered to be the undertaking of a project. (1977, 2nd Sess., c. 1182, s. 2.)

§ 131-177. Department of Human Resources is designated State Health Planning and Development Agency; powers and duties. — The Department of Human Resources is designated as the State Health Planning and Development Agency for the State of North Carolina, and is empowered to fulfill responsibilities defined in P.L. 93-641.

The department shall exercise the following powers and duties:

- (1) To establish standards and criteria or plans required to carry out the provisions and purposes of this Article and to adopt rules and regulations pursuant to Chapter 150A;
- (2) Adopt, amend, and repeal such rules and regulations, consistent with the laws of this State, as may be required by the federal government for grants-in-aid for health care facilities and health planning which may be made available by the federal government. This section shall be liberally construed in order that the State and its citizens may benefit from such grants-in-aid;
- (3) Define, by regulation, procedures for submission of periodic reports by persons or health facilities subject to agency review under this Article;
- (4) Develop policy, criteria, and standards for health care facilities planning, conduct statewide inventories of and make determinations of need for health care facilities, and develop a State plan coordinated with other plans of health systems agencies with other pertinent plans and with the State health plan of the Department;
- (5) Implement, by regulation, criteria for project review;
- (6) Have the power to grant, deny, suspend, or revoke a certificate of need;
- (7) Solicit, accept, hold and administer on behalf of the State any grants or bequests of money, securities or property to the Department for use by the Department or health systems agencies in the administration of this Article;
- (8) Develop procedures for appeals of decisions to approve or deny a certificate of need, as provided by G.S. 131-185;
- (9) The Secretary of Human Resources shall have final decision-making authority with regard to all functions described in this section. (1977, 2nd Sess., c. 1182, s. 2.)

§ 131-178. Services and facilities requiring certificates of need. — (a) No person shall undertake new institutional health services or health care facilities without first having obtained a certificate of need as provided by this Article.

(b) Projects subject to certificate of need review shall include "new institutional health services" as defined by this Article.

(c) Where the estimated cost of a proposed project is certified by a licensed architect or engineer to be one hundred fifty thousand dollars (\$150,000) or less, such expenditures shall be deemed not to exceed one hundred fifty thousand dollars (\$150,000) and shall not require review as a capital expenditure regardless of the actual cost of the project, provided that the following conditions are met:

- (1) The estimated cost is certified to the Department within 60 days of the date of submission of the project upon which the obligation for such expenditure is incurred. Such certified cost estimates shall be available for inspection at the facility and sent to the Department upon its request.
- (2) The facility on whose behalf the expenditure was made notifies the Department in writing within 30 days of the date on which such expenditure is made, if such expenditure exceeded one hundred fifty thousand dollars (\$150,000). Such notice shall include a copy of a certified cost estimate.

(d) The Department may grant a certificate of need which permits expenditures only for predevelopment activities, but does not authorize the offering or development of a new institutional health service with respect to which such predevelopment activities are proposed. Expenditures in preparation for the offering of a new institutional health service shall include expenditures for architectural designs, plans, working drawings, and specifications. Such expenditures shall also include those for site acquisition and preliminary plans, studies, and surveys.

(e) Before any person enters into a contractual arrangement to acquire diagnostic or therapeutic equipment with a value in excess of one hundred fifty thousand dollars (\$150,000), which will not be owned by or located in a health care facility, such person shall notify the department of such person's intent to acquire such equipment. Such notice shall be made in writing on such form as the Department shall prescribe and shall be made at least 30 days before contractual arrangements are entered into to acquire the equipment with respect to which the notice is given. For the purposes of this subsection, health care facility does not include a facility operated solely as part of the private medical practice of (i) an independent practitioner, (ii) a partnership, or (iii) a professional medical corporation.

(f) Any local health department under Article 3 of Chapter 130 of the General Statutes which provides a new institutional health service as defined in G.S. 131-176(17) is subject to the provisions of this Article. (1977, 2nd Sess., c. 1182, s. 2.)

§ 131-179. Nature and incidents of certificate of need; rules of Department.

— (a) A certificate of need shall be valid only for the defined scope, physical location, and person named in the application. A certificate of need shall not be transferable or assignable nor shall a project or capital expenditure project be transferred from one person to another. A certificate of need shall be valid for the period of time specified therein.

(b) A certificate of need shall be issued for a 12-month period, or such other lesser period as specified by the Department, effective on the date of the Department's action. Within the effective period, the legal proponent of the proposed project must perform on the project by fulfilling the specific performance requirements set forth by this Article for incurring a financial obligation in relation to the offering of a new institutional health service.

(c) By regulation, the Department may define the extent, not to exceed six months, for which a certificate of need may be renewed, provided the applicant by petition makes a good faith showing that, within a reasonable time, he will

complete the establishment, construction, or modification of the health care facility, and that he will incur the financial obligation within the extended approval period.

(d) The Department shall adopt rules pertaining to the requirement of filing for a certificate of need based on a change of ownership of a health care facility. Any substantial change as to the person who or the partnership which is the operator of a health care facility shall be subject to approval by the Department, provided, this provision will not interfere with the authority of the owner of a health care facility to make any change in employment of any administrator who holds a valid license issued by the North Carolina Department of Human Resources. The Department shall adopt rules which shall state, at a minimum, that any transfer, assignment or other disposition or change of ownership or control of fifty percent (50%) or more of the capital stock or voting rights thereunder of a corporation which is the operator of a health care facility in the State, or any transfer, assignment, or other disposition of the stock or voting rights thereunder of such corporation which results in the ownership or control of more than fifty percent (50%) of the stock or voting rights thereunder of such corporation by any person shall be subject to approval by the Department in accordance with procedures for filing a certificate of need application. In the absence of such approval, the enforcement provisions of G.S. 131-187 may be invoked. (1977, 2nd Sess., c. 1182, s. 2.)

§ 131-180. Application. — All persons or health care facilities subject to review, as defined in G.S. 131-176 must file an application for a certificate of need with the Department. An application for a certificate of need shall be made on the forms provided by the Department. This application shall contain such information as the Department, by regulation, deems necessary to conduct the review. Such application shall include affirmative evidence on which the Department shall make the findings required under this Article, and upon which the Department shall make its final decision on the application. (1977, 2nd Sess., c. 1182, s. 2.)

Cross Reference. — As to licensing of ambulatory surgical facilities, see § 131B-1 et seq.

§ 131-181. Review criteria. — (a) The Department shall promulgate rules implementing criteria outlined in this subsection to determine whether an applicant is to be issued a certificate for the proposed project. Criteria so implemented are to be consistent with federal law and regulations and shall cover:

- (1) The relationship of the proposed project to the State Medical Facilities Plan, the State Health Plan, and the State Mental Health Plan.
- (2) The relationship of services reviewed to the long-range development plan of the persons providing or proposing such services.
- (3) The need that the population served or to be served by such services has for such services.
- (4) The availability of less costly or more effective alternative methods of providing such services.
- (5) The immediate and long-term financial feasibility of the proposal, as well as the probable impact of the proposal on the costs of and charges for providing health services.
- (6) The relationship of the services proposed to be provided to the existing health care system of the area in which such services are proposed to be provided.
- (7) The availability of resources, including health manpower, management

personnel, and funds for capital and operating needs, for the provision of the services proposed to be provided and the availability of alternative uses of such resources for the provision of other health services.

- (8) The relationship, including the organizational relationship, of the health services proposed to be provided to ancillary or support services.
- (9) Special needs and circumstances of those entities which provide a substantial portion of their services or resources, or both, to individuals not residing in the health service areas in which the entities are located or in adjacent health service areas. Such entities may include medical and other health professions schools, multidisciplinary clinics and specialty centers.
- (10) The special needs and circumstances of health maintenance organizations for which assistance may be provided under Title XIII of the Public Health Service Act. Such needs and circumstances include the needs of and costs to members and projected members of the health maintenance organization in obtaining health services and the potential for a reduction in the use of inpatient care in the community through an extension of preventive health services and the provision of more systematic and comprehensive health services. The consideration of a new institutional health service proposed by a health maintenance organization shall also address the availability and cost of obtaining the proposed new institutional health service from the existing providers in the area that are not health maintenance organizations.
- (11) The special needs and circumstances of biomedical and behavioral research projects which are designed to meet a national need and for which local conditions offer special advantages.
- (12) In the case of a construction project, the costs and methods of the proposed construction, including the costs and methods of energy provision, and the probable impact of the construction project reviewed on the costs of providing health services by the person proposing the construction project.
- (13) The need that the medically underserved portion of the population, especially those people located in rural or economically depressed areas, has for such services, and the extent to which the project under review proposes to meet that need.

(b) Criteria adopted for reviews in accordance with subsection (a) of this section may vary according to the purpose for which a particular review is being conducted or the type of health service reviewed. (1977, 2nd Sess., c. 1182, s. 2.)

§ 131-182. Review process. — (a) Except as provided in subsection (c) of this section there shall be a time limit of 90 days for review of the project beginning on the day the department declares the application "complete for review," as established by departmental regulations.

- (1) The appropriate Health Systems Agency shall review each application for a certificate of need in accord with its adopted plans, standards, criteria, and procedures, and shall submit its comments thereon to the Department within 60 days after receipt of a complete application by the Department. The comments may include a recommendation to approve the application, to approve the application with conditions, to defer the application, or to deny the application. Suggested modifications, if any, shall relate directly to the project under review.
- (2) The appropriate Health Systems Agency shall, during the course of its review, provide an opportunity for a public meeting at which interested persons may introduce testimony and exhibits.
- (3) Any person may file written comments and exhibits concerning a proposal under review with the appropriate Health Systems Agency and the Department.

(b) The Department shall issue as provided in this Article a certificate of need with or without conditions or reject the application within the review period. If the Department fails to act within such period, the failure to act shall constitute denial of the application.

(c) The Department shall promulgate rules establishing criteria for determining when it would not be practicable to complete a review within 90 days from receipt of a completed application. If the Department finds that these criteria are met for a particular project, it may extend the review period for a period not to exceed 60 days and provide notice of such extension to all affected persons. (1977, 2nd Sess., c. 1182, s. 2.)

§ 131-183. Final decision. — The Department shall send its decision along with written findings to the person proposing the new institutional health service and to the Health Systems Agency for the health service area in which the new service is proposed to be offered or developed. In the case of a final decision to “approve” or “approve with conditions” a proposal for a new institutional health service, the Department shall issue a certificate of need to the person proposing the new institutional health service. (1977, 2nd Sess., c. 1182, s. 2.)

§ 131-184. Written notice of decision. — The Department shall, within 15 days after it makes a final decision on an application, provide in writing to the applicant, to the appropriate Health Systems Agency and, upon request to affected persons, the findings and conclusions on which it based its decision, including but not limited to the criteria used by the Department in making such decision. (1977, 2nd Sess., c. 1182, s. 2.)

§ 131-185. Rights of appeal and judicial review. — (a) In fulfilling the functions and duties of this Article the Department shall comply with the North Carolina Administrative Procedure Act, Chapter 150A.

(b) Any proponent of a new institutional health service or capital expenditure project or any person who qualifies as a “party” or “person aggrieved” under G.S. 150A-2 shall have all the rights of appeal and judicial review available under Articles 3 and 4 of Chapter 150A.

(c) In the instance that the Department makes a recommendation on review of a project which is inconsistent with a recommendation made by a particular Health Systems Agency, the Department shall submit a written, detailed statement of the reasons for the inconsistency. The Health Systems Agency may request an appeal under the North Carolina Administrative Procedure Act, Chapter 150A. (1977, 2nd Sess., c. 1182, s. 2.)

§ 131-186. Forfeiture of certificate of need. — The Department may revoke a certificate of need, for failure to perform on the certificate of need, based on rules adopted by the Department. The Department may revoke a certificate of need for, including but not necessarily limited to, the following reasons:

- (1) For failure to satisfy within 180 days following issuance of the certificate of need any performance requirements that may be set forth by the Department.
- (2) After review, upon 12 months’ duration of approval, for failure to incur the financial obligation for a capital expenditure as defined in this Article.
- (3) After notice and a fair hearing on proof that a person who has been awarded a certificate of need, and who before completion of the project and operation of the facility, has attempted to or has transferred or conveyed more than five percent (5%) ownership or control in a facility without prior written approval of the Department. Transfers resulting from personal illness or other good cause, as determined by the Department, may be exempt from this provision based on rules adopted

by the Department. Transfers resulting from death shall be exempt from this provision. (1977, 2nd Sess., c. 1182, s. 2.)

§ 131-187. Enforcement and sanctions. — (a) Only those new institutional health services which are found by the Department to be needed as provided in this Article and granted certificates of need shall be offered or developed within the State.

(b) No expenditures in excess of one hundred fifty thousand dollars (\$150,000) in preparation for the offering or development of a new institutional health service shall be made by any person unless a certificate of need for such service or activities has been granted, except as otherwise provided in G.S. 131-178.

(c) No formal commitments made for financing, construction, or acquisition regarding the offering or development of a new institutional health service shall be made by any person unless a certificate of need for such service or activities has been granted.

(d) Nothing in this Article shall be construed as terminating the P.L. 92-603, Section 1122 capital expenditure program or the contract between the State of North Carolina and the United States under that program. The sanctions available under that program and contract, with regard to the determination of whether the amounts attributable to an applicable project or capital expenditure project should be included or excluded in determining payments to the proponent under Titles V, XVIII, and XIX of the Social Security Act, shall remain available to the State.

(e) If any health care facility proceeds to offer or develop a new institutional health service without having first obtained a certificate of need for such services, the penalty for such violation of this Article and rules and regulations hereunder is the withholding of federal and State funds under Titles V, XVIII, and XIX of the Social Security Act for reimbursement of capital and operating expenses related to the provision of the new institutional health service.

(f) If any health care facility proceeds to offer or develop a new institutional health service without having first obtained a certificate of need for such services, the licensure for such facility may be revoked or suspended by the Medical Care Commission, or the Commission for Health Services, as appropriate.

(g) A civil penalty of not more than twenty thousand dollars (\$20,000) may be assessed by the Department against any person who knowingly offers or develops any new institutional health service within the meaning of this Article without a certificate of need issued under this Article and the rules and regulations pertaining thereto, or in violation of the terms of such a certificate. In determining the amount of the penalty the Department shall consider the degree and extent of harm caused by the violation and the cost of rectifying the damage. The Department may assess the penalties provided for in this subsection. Any person assessed shall be notified of the assessment by registered or certified mail, and the notice shall specify the reasons for the assessment. If the person assessed fails to pay the amount of the assessment to the Department within 30 days after receipt of notice, or such longer period, not to exceed 180 days, as the Department may specify, the Department may institute a civil action in the superior court of the county in which the violation occurred or, in the discretion of the Department, in the superior court of the county in which the person assessed has its principal place of business, to recover the amount of the assessment. In any such civil action, the scope of the court's review of the Department's action (which shall include a review of the amount of the assessment), shall be as provided in Chapter 150A of the General Statutes. For the purpose of this subsection, the word "person" shall not include an individual in his capacity as an officer, director, or employee of a person as otherwise defined in this Article.

(h) No agency of the State or any of its political subdivisions may appropriate

or grant funds or financially assist in any way a person, applicant, or facility which is or whose project is in violation of this Article.

(i) If any health care facility proceeds to offer or develop a new institutional health service without having first obtained a certificate of need for such services, the Secretary of Human Resources or any person aggrieved, as defined by G.S. 150A-2(6) may bring a civil action for injunctive relief, temporary or permanent, against the person offering, developing or operating any new institutional health service. (1977, 2nd Sess., c. 1182, s. 2.)

§ 131-188. **Venue.** — (a) Any action brought by a “person aggrieved,” as defined by G.S. 150A-2(6), to enforce the provisions of this Article against any health care facility, as defined in G.S. 131-176(10) or its agents or employees, may be brought in the superior court of any county in which the cause of action arose or in the county in which the health care facility is located, or in Wake County.

(b) An action brought by a “party,” as defined by G.S. 150A-2(5), who has exhausted all administrative remedies made available to that party by statute or rules and regulations, may be brought in the Superior Court of Wake County at any time after a final decision by the Department. Such action must be filed not later than 30 days after a written copy of the final decision by the Department is given by personal service or registered or certified mail to the persons seeking judicial review. (1977, 2nd Sess., c. 1182, s. 2.)

Chapter 131B.**Licensing of Ambulatory Surgical Facilities.**

Sec.

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131B-8. Penalties.

131B-9. Injunctive relief.

Repeal of Chapter. — This Chapter is repealed, effective July 1, 1981, by Session Laws 1977, c. 712, s. 3, as amended by Session Laws 1977, 2nd Sess., c. 1214, s. 2. The 1977 act also repeals, with postponed effective dates, numerous other chapters and articles creating licensing and regulatory agencies, and sets up a Governmental Evaluation Commission whose

function is to conduct a performance evaluation of the programs and functions of each such agency and report to the General Assembly whether the program or function in question should be terminated, reconstituted, reestablished or continued. The Commission will go out of existence June 30, 1983. The 1977 act, as amended, is codified as § 143-34.10 et seq.

§ 131B-1. Definitions. — As used in this Chapter, unless the context requires otherwise, the following terms have the meanings specified:

- (1) "Ambulatory Surgical Facility" means a public or private facility, not a part of a hospital, which provides surgical treatment to patients not requiring hospitalization. Such term does not include the offices of private physicians or dentists, whether for individual or group practice, unless they elect to apply for licensing.
- (2) "Department" means the North Carolina Department of Human Resources.
- (3) "Person" means an individual; a trust or estate; a partnership; a corporation, including associations, joint-stock companies, and insurance companies; the State, or a political subdivision or instrumentality of the State. (1977, 2nd Sess., c. 1214, s. 1.)

Cross Reference. — As to certificate of need required for ambulatory surgical facility, see § 131-175 et seq.

Session, c. 1214, s. 3, provides that the act is effective 90 days after ratification. The act was ratified June 16, 1978.

Editor's Note. — Session Laws 1977, 2nd

§ 131B-2. Purpose. — The purpose of this Chapter is to provide for the development, establishment and enforcement of basic standards:

- (1) For the care and treatment of individuals in ambulatory surgical facilities, and
- (2) For the maintenance and operation of ambulatory surgical facilities so as to ensure safe and adequate treatment of such individuals in ambulatory surgical facilities. (1977, 2nd Sess., c. 1214, s. 1.)

§ 131B-3. License requirement. — (a) No person shall operate an ambulatory surgical facility without a license obtained from the Department.

(b) Applications shall be available from the Department and each application filed with the Department shall contain all necessary and reasonable information that the Department may by rule require. A one-year license shall be granted to the applicant upon a determination by the Department that the applicant has complied with the provisions of this Chapter and the rules, regulations, or

standards promulgated by the Department under this Chapter.

(c) A license to operate an ambulatory surgical facility shall be annually renewed upon the filing and departmental approval of a renewal application. The renewal application shall be available from the Department and shall contain all necessary and reasonable information that the Department may by rule require.

(d) Each license shall be issued only for the premises and persons named in the application and shall not be transferable or assignable except with the written approval of the Department.

(e) Licenses shall be posted in a conspicuous place on the licensed premises. (1977, 2nd Sess., c. 1214, s. 1.)

§ 131B-4. Denial, suspension, or revocation of license. — (a) Subject to subsection (b), the Department is empowered to deny a new or renewal application for a license, and to suspend or revoke an existing license upon a determination that there has been a substantial failure to comply with the provisions of this Chapter or the rules, regulations or standards promulgated under this Chapter.

(b) The provisions of Chapter 150A of the General Statutes shall govern all administrative action and judicial review in the cases where the Department has taken the action described in subsection (a). (1977, 2nd Sess., c. 1214, s. 1.)

§ 131B-5. Rules and regulations. — The Medical Care Commission is empowered to adopt, amend and promulgate all necessary rules, regulations and standards as may be designed to further the accomplishment of this Chapter. These rules, regulations or standards shall be no stricter than those issued by the Medical Care Commission under G.S. 131-126.7 of the Hospital Licensing Act. The Medical Care Commission shall adopt its rules, regulations and standards within 30 days of the effective date of this Chapter. (1977, 2nd Sess., c. 1214, s. 1.)

Editor's Note. — Session Laws 1977, 2nd Sess., c. 1214, s. 3, provides that the act is effective 90 days after ratification. The act was ratified June 16, 1978.

§ 131B-6. Enforcement. — The Department shall enforce the rules, regulations and standards adopted, amended or promulgated by the Medical Care Commission with respect to ambulatory surgical facilities. (1977, 2nd Sess., c. 1214, s. 1.)

§ 131B-7. Inspections. — The Department shall make or cause to be made such inspections of ambulatory surgical facilities as it deems necessary. The Department is empowered to delegate to a State officer, agent, board, bureau or division of State government the authority to make such inspections according to the rules, regulations and standards promulgated by the Department. The Department may revoke such delegated authority in its discretion. (1977, 2nd Sess., c. 1214, s. 1.)

§ 131B-8. Penalties. — A person who owns (in whole or in part) or operates an ambulatory surgical facility without a license is guilty of a misdemeanor, and upon conviction will be subject to a fine of not more than fifty dollars (\$50.00) for the first offense and not more than five hundred dollars (\$500.00) for each subsequent offense. Each day of continuing violation after conviction is considered a separate offense. (1977, 2nd Sess., c. 1214, s. 1.)

§ 131B-9. Injunctive relief. — The Department may commence an action in the name of the State for an injunction or other process against any person to prevent the operation of an ambulatory surgical facility without a license. Such action shall be brought in the Superior Court of Wake County. (1977, 2nd Sess., c. 1214, s. 1.)

Chapter 132.
Public Records.

§ 132-1. "Public records" defined.

Editor's Note. —
For comment on public access to government held records, see 55 N.C.L. Rev. 1187 (1977).

§ 132-6. Inspection and examination of records.

Editor's Note. — For comment on public access to government held records, see 55 N.C.L. Rev. 1187 (1977).

§ 132-9. Violation of Chapter a misdemeanor.

Editor's Note. —
For comment on public access to government held records, see 55 N.C.L. Rev. 1187 (1977).

Chapter 135.

Retirement System for Teachers and State Employees;
Social Security.

Article 1.

Retirement System for Teachers and State
Employees.

Sec.

135-4. Creditable service.

Article 3.

Other Teacher, Employee Benefits.

135-33. Hospital and medical insurance.

Article 4B.

Uniform Clerks of Superior Court
Retirement Act of 1975.

Sec.

135-86. Transfer of retirees.

ARTICLE 1.

Retirement System for Teachers and State Employees.

§ 135-4. Creditable service.

(m) All repayments must be made within three years after the member first becomes eligible to make such repayment.

(n) Wherever the terminology "out-of-state service," is used in this section, that terminology shall be interpreted to include the United States Public Health Service and time spent in the Merchant Marines while in the United States Naval Reserve. (1941, c. 25, s. 4; 1943, cc. 200, 783; 1945, c. 797; 1947, c. 575; 1949, c. 1056, ss. 2, 4; 1953, c. 1050, s. 3; 1959, c. 513, s. 1½; 1961, c. 516, s. 3; c. 779, s. 2; 1963, c. 1262; 1965, c. 780, s. 1; c. 924; 1967, c. 720, s. 3; 1969, c. 1223, ss. 3, 4; 1971, c. 117, ss. 9, 10; c. 993; 1973, c. 241, s. 2; c. 242, s. 1; c. 667, s. 2; c. 737, s. 1; c. 816, s. 1; c. 1063; c. 1311, ss. 1-5; 1975, c. 205, s. 2; c. 875, s. 47; 1977, c. 317; c. 790.)

Editor's Note. —

In an opinion of the Attorney General noted below, it was decided that the second 1975 amendment, effective July 1, 1975, repealed only the first paragraph of subsection (m), rather than the entire subsection as previously codified. Therefore the former second paragraph of subsection (m) has been restored, with the original designation (m), and the subsection added by the second 1977 amendment has been redesignated (n). The following notes should be substituted for the second 1975 amendment note and the 1977 amendment note in the 1977 Cumulative Supplement:

The second 1975 amendment, effective July 1,

1975, repealed the former first paragraph of subsection (m), relating to payment of the employer portion of the annual cost to fund the provisions of subsections (f)(6), (k) and (l).

The second 1977 amendment added subsection (n).

As the other subsections were not affected, only subsections (m) and (n) are set out.

Second Paragraph of G.S. 135-4(m) Was Not Repealed by Session Laws 1975, Chapter 875.

— See opinion of Attorney General to Mr. W. H. Hambleton, Director, Retirement and Health Benefits Division, Department of the Treasurer, Nov. 8, 1977.

ARTICLE 3.

Other Teacher, Employee Benefits.

§ 135-33. Hospital and medical insurance. — The Board of Trustees of the Retirement System shall formulate, establish and administer for teachers and State employees a program of hospital and medical care benefits to the extent that funds for such benefits are specifically appropriated by the General Assembly. Such a program may be provided by the Board either directly or through the purchase of contracts therefor, or any combination thereof, as in

its discretion it may deem wise and expedient. In awarding any contracts pursuant to this section, the Board shall give consideration to the total or overall cost of complete family coverage by teachers and State employees. Notwithstanding any provisions of this section to the contrary any member who was vested at the time of retirement, his surviving spouse, and the surviving spouse of a teacher or State employee who is receiving a survivor's alternate benefit under G.S. 135-5(m), may obtain or continue the same hospital and medical care insurance and benefits for himself and/or dependents available to active teachers and State employees until they become ineligible for such insurance or benefits due to reasons other than retirement, provided such member or dependents or surviving spouse agrees to and pays by a deduction from retirement benefits or by other appropriate method an amount not greater than the cost of such benefits for active teachers and State employees, adjusted for any appropriation by the General Assembly for qualified individuals. And provided further the Board of Trustees shall offer any members who were vested at the time of retirement, their spouses or surviving spouses, and the surviving spouses of teachers and State employees who are receiving a survivor's alternate benefit under G.S. 135-5(m), who are eligible for Medicare a plan of supplemental insurance designed to provide them with medical and hospital insurance benefits comparable to the benefits offered active teachers and State employees, if such member or surviving spouse agrees to and pays by a deduction from retirement benefits or other appropriate method the cost of such benefits, adjusted for any appropriation by the General Assembly for qualified individuals. (1971, c. 1009, s. 1; 1973, c. 746; c. 1278, s. 1; 1975, c. 754, s. 1; 1977, c. 24; 1977, 2nd Sess., c. 1136, s. 18.1.)

Editor's Note. —

The 1977, 2nd Sess., amendment, effective July 1, 1978, added "adjusted for any appropriation by the General Assembly for

qualified individuals" at the end of the fourth and fifth sentences.

Session Laws 1977, 2nd Sess., c. 1136, s. 45, contains a severability clause.

ARTICLE 4B.

Uniform Clerks of Superior Court Retirement Act of 1975.

§ 135-86. Transfer of retirees. — Any retired clerks of superior court of the General Court of Justice who retired prior to July 1, 1975, with 30 years or more of creditable service, may elect to have their retirement accounts transferred from the Teachers' and State Employees' Retirement System to the Uniform Clerks of Superior Court Retirement System. Any retired clerks of superior court whose retirement accounts are transferred under this provision shall be entitled to the benefits to which they would have been entitled had they retired on the benefit formula provided in the Uniform Clerks of Superior Court Retirement System. (1977, 2nd Sess., c. 1293, s. 1.)

Editor's Note. — Session Laws 1977, 2nd Sess., c. 1293, s. 4, makes the act effective July 1, 1978.

Session Laws 1977, 2nd Sess., c. 1293, s. 2, provides: "The Board of Trustees of the Teachers' and State Employees' Retirement System is hereby directed to transfer assets from the Pension Accumulation Fund of the Teachers' and State Employees' Retirement

System to the Pension Accumulation Fund of the Uniform Clerks of Superior Court Retirement System, to the extent of the reserves previously set aside to fund the benefits of transferred retired clerks of superior court as determined by the actuary, to partially offset the cost of the benefits provided under the Uniform Clerks of Superior Court Retirement System."

Chapter 136.

Roads and Highways.

Article 6D.

Controlled-Access Facilities.

Sec.

136-89.59. Highway rest area refreshments.

drilling or boring upon
right-of-way; filing record of
results with Department of
Transportation.

Article 7.

Miscellaneous Provisions.

136-102.2. Authorization required for test

ARTICLE 6D.

Controlled-Access Facilities.

§ 136-89.52. Acquisition of property and property rights.

Denial of access is to be considered, etc. —

This section, by implication, requires the trial court to instruct the jury on the nature of the controlled-access facility, and that this denial of

access should be considered in determining the fair market value of the remaining land. The failure to do so is error. *Board of Transp. v. Brown*, 34 N.C. App. 266, 237 S.E.2d 854 (1977).

§ 136-89.59. Highway rest area refreshments. — All civic, nonprofit, or charitable corporations and organizations are authorized to serve nonalcoholic refreshments to motorists at rest areas and welcome centers located on controlled-access facilities in accordance with the following conditions:

- (5) Signs shall be displayed by the corporation or organization, and the Department of Transportation is hereby authorized to promulgate rules and regulations governing the size, content and location of such signs. (1977, c. 464, s. 7.1.)

Editor's Note. —

The 1977 amendment, effective July 1, 1977, substituted "Department of Transportation" for "Board of Transportation" in subdivision (5).

The amendment was inadvertently omitted in

the 1977 Cumulative Supplement.

As the rest of the section was not changed by the amendment, only the introductory language and subdivision (5) are set out.

ARTICLE 7.

Miscellaneous Provisions.

§ 136-102. Billboard obstructing view at entrance to school, church or public institution on public highway.

Editor's Note. —

The Editor's note in the 1977 Cum. Supp. should be deleted.

§ 136-102.2. Authorization required for test drilling or boring upon right-of-way; filing record of results with Department of Transportation. — No person, firm or corporation shall make any test drilling or boring upon the right-of-way of any road or highway, under the jurisdiction of the Department of Transportation, until written authorization has been obtained from the owner or the person in charge of the land on which the highway easement is located. A complete record showing the results of the test drilling or boring shall be filed

forthwith with the chairman [Secretary] of the Department of Transportation and shall be a public record. This section shall not apply to the Department of Transportation making test drilling or boring for highway purposes only. (1967, c. 923, s. 1; 1973, c. 507, s. 5; 1977, c. 464, s. 7.1.)

Editor's Note. —

The 1977 amendment, effective July 1, 1977, substituted "Department of Transportation" for

"Board of Transportation" in three places.

The 1977 amendment was inadvertently omitted from the 1977 Cum. Supp.

ARTICLE 9.

Condemnation.

§ 136-103. Institution of action and deposit.

Editor's Note. —

For note discussing constitutional challenges to "quick take" condemnation proceedings, see

8 N.C. Cent. L.J. 289 (1977).

Cited in Board of Transp. v. Greene, 35 N.C. App. 187, 241 S.E.2d 152 (1978).

§ 136-104. Vesting of title and right of possession; recording memorandum or supplemental memorandum of action.

Editor's Note. —

For note discussing constitutional challenges

to "quick take" condemnation proceedings, see 8 N.C. Cent. L.J. 289 (1977).

§ 136-105. Disbursement of deposit; serving copy of disbursing order on Board of Transportation.

Title dispute held to prohibit disbursement of funds. — See Board of Transp. v. Greene, 35 N.C. App. 187, 241 S.E.2d 152 (1978).

§ 136-108. Determination of issues other than damages.

Editor's Note. —

For note discussing constitutional challenges

to "quick take" condemnation proceedings, see 8 N.C. Cent. L.J. 289 (1977).

§ 136-112. Measure of damages.

The market value of property is to be determined, etc. —

The value of land taken should be ascertained as of the date of taking. Board of Transp. v. Brown, 34 N.C. App. 266, 237 S.E.2d 854 (1977).

Value of Remainder of Land Where Only a Part is Appropriated. — The fair market value of the remainder immediately after the taking where only a part or a tract of land is appropriated for highway purposes contemplates the project in its completed state and any damage to the remainder due to the user to which the part appropriated may, or probably will, be put. Board of Transp. v. Brown, 34 N.C. App. 266, 237 S.E.2d 854 (1977).

In determining the fair market value of the remaining land where only a part or a tract of land is appropriated for highway purposes, the

owner is entitled to damage which is a consequence of the taking of the portion thereof, that is, for the injuries accruing to the residue from the taking, which includes damage resulting from the condemnor's use of the appropriated portion. Board of Transp. v. Brown, 34 N.C. App. 266, 237 S.E.2d 854 (1977).

The rule supported by better reason and the weight of authority is that the just compensation assured by the Fifth Amendment to an owner, a part of whose land is taken for public use, does not include the diminution of value of the remainder, caused by the acquisition and use of adjoining lands of others for the same undertaking. Board of Transp. v. Brown, 34 N.C. App. 266, 237 S.E.2d 854 (1977).

If only a portion of a single tract is taken, the owner's compensation for that taking includes

any element of value arising out of the relation of the part taken to the entire tract. Board of Transp. v. Brown, 34 N.C. App. 266, 237 S.E.2d 854 (1977).

Noise or any other element of damages to the remaining lands where only a part or a tract of land is appropriated for highway purposes is compensable only if it is demonstrably resultant from the use of the particular land taken. Board of Transp. v. Brown, 34 N.C. App. 266, 237 S.E.2d 854 (1977).

The landowner who has a part of his tract

taken has the burden of proving by competent evidence how the use of the land taken results in damage to the remainder. Board of Transp. v. Brown, 34 N.C. App. 266, 237 S.E.2d 854 (1977).

The exclusion of evidence of traffic noise from the controlled-access highway to be constructed on the part of the plaintiffs' land taken by the Department, which would cause a diminution in value of the remaining land, was prejudicial error. Board of Transp. v. Brown, 34 N.C. App. 266, 237 S.E.2d 854 (1977).

ARTICLE 11.

Outdoor Advertising Control Act.

§ 136-127. Declaration of policy.

The purpose of this Article is to control the erection and maintenance of outdoor advertising devices in order to promote the safety, convenience and enjoyment of travel and to

protect public investment in interstate and primary highways within the State. Bracey Adv. Co. v. North Carolina Dep't of Transp., 35 N.C. App. 226, 241 S.E.2d 146 (1978).

§ 136-130. Regulation of advertising.

Quoted in Freeland v. Greene, 33 N.C. App. 537, 235 S.E.2d 852 (1977).

§ 136-133. Permits required.

Quoted in Freeland v. Greene, 33 N.C. App. 537, 235 S.E.2d 852 (1977).

§ 136-134. Unlawful advertising.

Quoted in Freeland v. Greene, 33 N.C. App. 537, 235 S.E.2d 852 (1977).

§ 136-134.1. Judicial review.

Administrative Remedies Must Be Exhausted. — The express language of this section makes clear the legislative intent that recourse to the courts is to be had by the aggrieved party only after exhausting all

administrative remedies made available to him by rules and regulations enacted pursuant to this Article. Freeland v. Greene, 33 N.C. App. 537, 235 S.E.2d 852 (1977).

§ 136-140. Availability of federal aid funds.

Applied in Bracey Adv. Co. v. North Carolina Dep't of Transp., 35 N.C. App. 226, 241 S.E.2d 146 (1978).

Chapter 138.

Salaries, Fees and Allowances.

Sec.

138-6. Travel allowances of State officers and employees.

§ 138-6. Travel allowances of State officers and employees. — (a) Travel on official business by the officers and employees of State departments, institutions and agencies which operate from funds deposited with the State Treasurer shall be reimbursed at the following rates:

- (1) For transportation by privately owned automobile, seventeen cents (17¢) per mile of travel and the actual cost of tolls paid;
- (2) For bus, railroad, Pullman, or other conveyance, actual fare;
- (3) In lieu of actual expenses incurred for subsistence, payment of twenty-seven dollars (\$27.00) per day when traveling in-state or thirty-nine dollars (\$39.00) per day when traveling out-of-state. When travel involves less than a full day (24-hour period), a reasonable prorated amount shall be paid in accordance with regulations and criteria which shall be promulgated and published by the Director of the Budget. This shall not apply to those employees who are employed by the North Carolina State Burial Association Commission.
- (4) For convention registration fees not to exceed thirty dollars (\$30.00) per convention.

(1977, 2nd Sess., c. 1136, s. 38.1; c. 1237, ss. 1, 2.)

Editor's Note. — The first 1977, 2nd Sess., amendment, effective July 1, 1978, substituted "seventeen cents (17¢)" for "fifteen cents (15¢)" in subdivision (a)(1).

The second 1977, 2nd Sess., amendment, effective July 1, 1978, increased the amounts in the first sentence of subdivision (a)(3) from \$23.00 to \$27.00 and from \$35.00 to \$39.00 dollars and increased the amount in subdivision (a)(4) from \$15.00 to \$30.00.

Session Laws 1977, 2nd Sess., c. 1237, s. 3,

provides: "The heads of departments shall administer the provisions of Section 1 and Section 2 above [subdivisions (3) and (4) of this section] in a manner to assure that these provisions are funded from within existing authorized budgets."

Session Laws 1977, 2nd Sess., c. 1136, s. 45, contains a severability clause.

As subsection (b) was not changed by the amendments, it is not set out.

Chapter 139.

Soil and Water Conservation Districts.

Article 3.

Watershed Improvement Programs;
Expenditure by Counties.

Sec.

139-48 to 139-52. [Reserved.]

Article 4.

Grants for Small Water-
shed Projects.

139-53. State Soil and Water Conservation

Sec.

Commission authorized to accept applications.

139-54. Purposes for which grants may be requested.

139-55. Review of applications.

139-56. Recommendation of priorities and disbursal of grant funds.

139-57. Availability of funds.

ARTICLE 3.

Watershed Improvement Programs; Expenditure by Counties.

§§ 139-48 to 139-52: Reserved for future codification purposes.

ARTICLE 4.

Grants for Small Watershed Projects.

§ 139-53. **State Soil and Water Conservation Commission authorized to accept applications.** — The State Soil and Water Conservation Commission is authorized to accept applications for grants for nonfederal costs relating to small watershed projects authorized under Public Law 566 (83rd Congress as amended) from local sponsors of such projects properly organized under the provisions of either Chapter 156 of the General Statutes of North Carolina or Chapter 139 of the General Statutes of North Carolina. Applications shall be made on forms prescribed by the commission. (1977, 2nd Sess., c. 1206.)

§ 139-54. **Purposes for which grants may be requested.** — Applications for grants may be made for the nonfederal share of small watershed projects for the following purposes in amounts not to exceed the percentage of the nonfederal costs indicated:

- (1) Land rights acquisition for impounding or retarding water — fifty percent (50%);
- (2) Engineering fees — fifty percent (50%);
- (3) Anticipated future and present water supply needs in conjunction with watershed improvement works or projects as described in G.S. 139-37.1 — fifty percent (50%);
- (4) Installation of recreational facilities and services (to include land acquisition) as described in G.S. 139-46 — fifty percent (50%);
- (5) Construction costs for water management (drainage or irrigation) purposes — fifty percent (50%);
- (6) Conservation and replacement of fish and wildlife habitat as described in G.S. 139-46 — seventy-five percent (75%). (1977, 2nd Sess., c. 1206.)

§ 139-55. **Review of applications.** — (a) The State Soil and Water Conservation Commission shall receive and review applications for grants for small watershed projects authorized under Public Law 566 (83rd Congress, as amended) and approve, approve in part, or disapprove all such applications.

(b) In reviewing each application, the State Soil and Water Conservation Commission shall consider:

- (1) The financial resources of the local sponsoring organization;

- (2) Nonstructural measures such as sediment control ordinances and flood plain zoning ordinances enacted and enforced by local governments to alleviate flooding;
- (3) Regional benefits of projects to an area greater than the area under jurisdiction of the local sponsoring organization;
- (4) Any direct benefit to State-owned lands and properties. (1977, 2nd Sess., c. 1206.)

§ 139-56. Recommendation of priorities and disbursal of grant funds. — Whenever two or more applications for grants are approved in whole or in part, the State Soil and Water Conservation Committee shall establish priorities among the several applications for disbursal of grant funds. To the extent that funds are available, the State Soil and Water Conservation Commission may authorize the disbursal of grant funds to the applicants consistent with the established priorities. The State Soil and Water Conservation Commission shall promulgate regulations to provide for an audit of grant funds to assure that they are spent for the purposes delineated in the application. Established priorities may be reviewed from time to time and revised if circumstances warrant such revision. (1977, 2nd Sess., c. 1206.)

§ 139-57. Availability of funds. — All grants shall be contingent upon the availability of funds for disbursement to applicants. At the end of each fiscal year the State Soil and Water Conservation Commission shall notify all applicants whose applications have been approved and to whom grant funds have not been disbursed of the status of their application. At the time of notification the State Soil and Water Conservation Commission shall notify the applicants of the availability of funds for grants in the upcoming fiscal year and at the same time shall notify the applicants of their position on any priority list that may have been established for the disbursal of grant funds for small watershed projects. (1977, 2nd Sess., c. 1206.)

Chapter 143.**State Departments, Institutions, and Commissions.****Article 1.****Executive Budget Act.**

Sec.

143-16.1. Federal funds.

Article 1.1.**Periodic Review of Certain
State Agencies.**143-34.12. Certain General Statutes provisions
repealed effective July 1, 1981.**Article 12.****Law-Enforcement Officers'
Benefit and Retirement Fund.**143-166. Law-Enforcement Officers' Benefit
and Retirement Fund.**Article 33B.****Meetings of Governmental Bodies.**

Sec.

143-318.1. Public policy.

143-318.2. All official meetings open to the
public.143-318.3. Executive, closed and private
sessions.

143-318.4. Exceptions.

143-318.8. Public notice of official meetings.

Article 36.**Department of Administration.**143-342.1. State-owned office space; fees for use
by self-supporting agencies.**ARTICLE 1.***Executive Budget Act.*

§ 143-16.1. **Federal funds.** — All federal funds shall be expended and reported in accordance with provisions of the Executive Budget Act. Proposed budgets recommended to the General Assembly by the Governor and Advisory Budget Commission shall include all appropriate information concerning the federal expenditures in State agencies, departments and institutions. (1977, 2nd Sess., c. 1219, s. 45.)

Editor's Note. — Session Laws 1977, 2nd Sess., c. 1219, s. 59, makes the act effective July 1, 1978.

Session Laws 1977, 2nd Sess., c. 1219, s. 57, contains a severability clause.

ARTICLE 1.1.*Periodic Review of Certain State Agencies.*

§ 143-34.12. **Certain General Statutes provisions repealed effective July 1, 1981.** — The following statutes are repealed effective July 1, 1981, (except for purposes of the winding-up period, as provided by G.S. 143-34.14):

Chapter 90, Article 1, entitled "Practice of Medicine."

Chapter 90, Article 2, entitled "Dentistry."

Chapter 90, Article 4, entitled "Pharmacy."

Chapter 90, Article 6, entitled "Optometry."

Chapter 90, Article 7, entitled "Osteopathy."

Chapter 90, Article 8, entitled "Chiropractic."

Chapter 90, Article 9, entitled "Nurse Practice Act."

Chapter 90, Article 10, entitled "Midwives," and Chapter 130, Article 18, entitled "Midwives."

Chapter 90, Article 11, entitled "Veterinarians."

Chapter 90, Article 12A, entitled "Podiatrists."

Chapter 90, Article 13A, entitled "Practice of Funeral Service."

Chapter 90, Article 16, entitled "Dental Hygiene Act."

Chapter 90, Article 17, entitled "Dispensing Opticians."

Chapter 90, Article 18, entitled "Physical Therapy."

Chapter 90, Article 18A, entitled "Practicing Psychologists."

Chapter 90, Article 20, entitled "Nursing Home Administration Act."

Chapter 86, entitled "Barbers."

Chapter 88, entitled "Cosmetic Art."

Chapter 108, Article 3, Part 2, entitled "Licensing of Private Institutions (maternity homes, homes for the aged and infirm, private child-care institutions)."

Chapter 110, Article 3, entitled "Control over Child-Caring Facilities," and Article 7, entitled "Day-Care Facilities."

Chapter 143B, Article 9, Part 4, entitled "Child Day-Care Licensing Commission."

Chapter 122, Article 2E, entitled "Licensing of Local Mental Health Facilities."

G.S. 122-72, entitled "Licensing and Control of Local Mental Institutions and Homes."

Chapter 130, Article 26, entitled "Regulation of Ambulance Services."

Chapter 131, Article 13A, entitled "Hospital Licensing Act."

Chapter 66, Article 9, entitled "Collection of Accounts."

Chapter 66, Article 9B, entitled "Motor Clubs and Associations."

Chapter 113A, Article 7, entitled "Coastal Area Management."

Chapter 143, Article 21, entitled "Water and Air Resources," (except Part 3).

Chapter 143, Article 21A, entitled "Oil Pollution Control."

Chapter 143, Article 21B, entitled "Air Pollution Control."

Chapter 143, Article 38, entitled "Water Resources."

Chapter 143B, Article 7, Part 4, entitled "Environmental Management Commission."

Chapter 131B, entitled "Licensing of Ambulatory Surgical Facilities." (1977, ch. 712, s. 3; 1977, 2nd Sess., c. 1214, s. 2.)

Editor's Note. — The 1977, 2nd Sess., 90 days after ratification, added Chapter 131B amendment, ratified June 16, 1978, and effective to the list of repealed statutes.

ARTICLE 8.

Public Building Contracts.

§ 143-128. Separate specifications for building contracts; responsible contractors.

Cross Reference. —

As to application of this Article to lease of personal property with an option to purchase by

a county, see § 160A-19 in Replacement Volume 3D.

ARTICLE 9A.

Uniform Standards Code for Mobile Homes.

§ 143-144. Short title.

Editor's Note. —

For comment on the status of mobile homes as residences or vehicles and their regulation in

North Carolina municipalities, see 50 N.C.L. Rev. 612 (1972).

ARTICLE 12.

*Law-Enforcement Officers' Benefit and Retirement Fund.***§ 143-166. Law-Enforcement Officers' Benefit and Retirement Fund.**

(b) For the purpose of determining the recipients of benefits under this section and the amounts thereof to be disbursed and for formulating and making such rules and regulations as may be essential for the equitable and impartial distribution of such benefits to and among the persons entitled to such benefits, there is hereby created a board to be known as "The Board of Commissioners of the Law-Enforcement Officers' Benefit and Retirement Fund," which shall consist of the State Treasurer, who shall be chairman ex officio of said Board, the State Auditor, the State Insurance Commissioner, and four members to be appointed by the Governor and to serve at his will, one of whom shall be a sheriff, one a police officer, one from the group of law-enforcement officers as hereinafter defined, employed by the State, and one representing the public at large. No member of said Board of Commissioners shall receive any salary, compensation or expenses other than that provided in G.S. 138-5 for each day's attendance at duly and regularly called and held meetings of the Commission, the total of which meetings for which per diem may be allowable as herein provided not to exceed eight meetings in any one year. Four members of said Board shall constitute a quorum at any of said meetings, and no business shall be transacted unless a quorum be present. Ex officio members shall not receive any per diem.

(1977, 2nd Sess., c. 1204, s. 3.)

Editor's Note. —

The 1977, 2nd Sess., amendment, effective July 1, 1978, substituted, in the first sentence of subsection (b), "shall consist of the State Treasurer, who shall be chairman ex officio of

said Board, the State Auditor" for "shall consist of the State Auditor, who shall be chairman ex officio of said Board, the State Treasurer."

As the rest of the section was not changed by the amendment, only subsection (b) is set out.

ARTICLE 21B.

*Air Pollution Control.***§ 143-215.105. Declaration of policy; definitions.**

Cited in *Steele Creek Community Ass'n v. United States Dep't of Transp.*, 435 F. Supp. 196 (W.D.N.C. 1977).

ARTICLE 31.

*Tort Claims against State Departments and Agencies.***§ 143-291. Industrial Commission constituted a court to hear and determine claims; damages.****Editor's Note. —**

For note on tort liability of municipal corporations operating public hospitals in this state, see 54 N.C.L. Rev. 1114 (1976).

For survey of 1976 case law dealing with administrative law, see 55 N.C.L. Rev. 898 (1977).

ARTICLE 31A.

*Defense of State Employees.***§ 143-300.6. Payments of judgments; compromise and settlement of claims.****Editor's Note. —**

For a note on the liability of those charged as custodians of the convicted for personal injuries

inflicted by inmates, parolees, and probationers, see 13 Wake Forest L. Rev. 668 (1977).

ARTICLE 33B.

Meetings of Governmental Bodies.

§ 143-318.1. Public policy. — Whereas the public bodies that administer the legislative, policy-making, quasi-judicial, administrative, and advisory functions of this State and its political subdivisions exist solely to conduct the people's business, it is the public policy of this State that the hearings, deliberations, and actions of these bodies be conducted openly. (1971, c. 638, s. 1; 1977, 2nd Sess., c. 1191, s. 1.)

Editor's Note. —

The 1977, 2nd Sess., amendment, effective Oct. 1, 1978, substituted "public bodies that administer the legislative, policy-making, quasi-judicial, administrative, and advisory functions" for "commissions, committees, boards, councils and other governing and governmental bodies which administer the legislative and executive functions" near the

beginning of the section and substituted "these" for "said" preceding "bodies" near the end of the section.

For article, "Interpreting North Carolina's Open-Meetings Law," see 54 N.C.L. Rev. 777 (1976).

For survey of 1976 case law dealing with administrative law, see 55 N.C.L. Rev. 898 (1977).

§ 143-318.2. All official meetings open to the public. — (a) Except as provided in G.S. 143-318.3, G.S. 143-318.4, and G.S. 143-318.5, each official meeting of a public body shall be open to the public, and any person is entitled to attend such a meeting.

(b) As used in this Article, "public body" means any authority, board, commission, committee, council, or other body of the State, or of one or more counties, cities, school administrative units, or other political subdivisions or public corporations in the State that is composed of two or more members and

- (1) Exercises or is authorized to exercise any legislative, policy-making, quasi-judicial, administrative, or advisory function; and
- (2) Is established by (i) the State Constitution, (ii) an act or resolution of the General Assembly, (iii) a resolution or order of a State Agency, pursuant to a statutory procedure under which the agency establishes a political subdivision or public corporation, (iv) an ordinance, resolution, or other action of the governing board of one or more counties, cities, school administrative units, or other political subdivisions or public corporations, or (v) an executive order of the Governor or formal action of the head of a principal State office or department, as defined in G.S. 143A-11 and G.S. 143B-6, or of a division thereof.

In addition, "public body" means a committee of a public body and the governing board of a "public hospital," as defined in G.S. 159-39. This provision shall not apply to committees which are not policy-making bodies of public hospitals.

(c) "Public body" does not include and shall not be construed to include meetings among the professional staff of a public body, unless the staff members have been appointed to and are meeting as an authority, board,

commission, committee, council, or other body established by one of the methods listed in subdivision (b)(2) of this section.

(d) "Official meeting" means any meeting, assembly, or gathering together at any time and place of a majority of the members of a public body for the purpose of conducting hearings, participating in deliberations, or voting upon or otherwise transacting the public business within the jurisdiction, real or apparent, of the public body; provided, however, a social meeting or other informal assembly or gathering together of the members of a public body does not constitute an official meeting unless called or held to evade the spirit and purposes of this Article. (1971, c. 638, s. 1; 1977, 2nd Sess., c. 1191, s. 2.)

Editor's Note. — The 1977, 2nd Sess., amendment, effective Oct. 1, 1978, rewrote this section.

Meetings of Faculty of University of North Carolina Law School. — This section as it stood before the 1977, 2nd Sess., amendments did not require that meetings of the faculty of the school of law of the University of North Carolina be open to the public. *Student Bar Ass'n Bd. of Governors v. Byrd*, 293 N.C. 594, 239 S.E.2d 415 (1977).

The board of governors of the University of North Carolina has no governmental powers; i.e., no powers peculiar to the sovereign. *Student Bar Ass'n Bd. of Governors v. Byrd*, 293 N.C. 594, 239 S.E.2d 415 (1977), decided under this

section as it stood before the 1977, 2nd Sess., amendment.

Since the board of governors of the University of North Carolina has no governmental powers, i.e., no powers peculiar to the sovereign, the board of governors was not, itself, a "governmental body of this State" within the meaning of this section as it stood before the 1977, 2nd Sess., amendment, and this section did not extend to the meetings of its employees, even though such employees might be deemed a "component part" of the board of governors. *Student Bar Ass'n Bd. of Governors v. Byrd*, 293 N.C. 594, 239 S.E.2d 415 (1977), decided under this section as it stood before the 1977, 2nd Sess., amendment.

§ 143-318.3. Executive, closed and private sessions. — (a) A public body, by the votes of a majority of its members present, may, during any regular or special meeting when a quorum is present, hold an executive session and exclude the public while considering:

- (1) Acquisition, lease, or alienation of property;
- (2) Negotiations between public employers and their employees or representatives thereof as to employment;
- (3) Matters dealing with patients, employees or members of the medical staff of a hospital or medical clinic (including but not limited to all aspects of admission, treatment, and discharge, all medical records, reports and summaries, and all charges, accounts and credit information pertaining to said patients; all negotiations, contracts, conditions, assignments, regulations and disciplines relating to employees; and all aspects of hospital management, operation and discipline relating to members of the medical staff);
- (4) Any matter coming within the physician-patient, lawyer-client or any other privileged relationship;
- (5) Conferences with legal counsel and other deliberations concerning the prosecution, defense, settlement or litigation of any judicial action or proceeding in which the public body is a party or by which it is directly affected.

(b) This Article shall not be construed to prevent any public body from holding closed sessions to consider information regarding the appointment, employment, discipline, termination or dismissal of an employee or officer under the jurisdiction of such body and to hear and consider testimony on a complaint against such employee or officer; provided, however, that final action on the discharge of any employee for cause after hearing shall be taken in open session if such discharge is within the exclusive jurisdiction of the public body. Nor shall this Article be construed to prevent any board of education or governing body

of any public educational institution, or any committee or officer thereof, from hearing, considering and deciding in closed session (i) disciplinary cases involving students and (ii) questions of reassignments of pupils under G.S. 115-178.

(1977, 2nd Sess., c. 1191, s. 3.)

Editor's Note. — The 1977, 2nd Sess., amendment, effective Oct. 1, 1978, substituted "A public body" for "Any of the bodies specified in G.S. 143-318.1" at the beginning of subsection (a), substituted "public body" for "governing or governmental body" in subdivision (5) of subsection (a) and for "governing or governmental body specified in G.S. 143-318.1" near the beginning of the first sentence of subsection (b), substituted "the public body" for "said governing body" at the end of the first sentence of subsection (b) and substituted "considering and deciding in closed session (i) disciplinary cases involving students and (ii) questions of reassignments of pupils under G.S. 115-178" for "considering and deciding disciplinary cases involving students in closed session" at the end of the second sentence of subsection (b).

As subsection (c) was not changed by the amendment, it is not set out.

For survey of 1976 case law dealing with administrative law, see 55 N.C.L. Rev. 898 (1977).

The purpose of the last sentence in subsection (b) was to remove any possibility that a board of education, a governing body of

a public educational institution or a court could believe that this article requires a public hearing of disciplinary matters. *Student Bar Ass'n Bd. of Governors v. Byrd*, 293 N.C. 594, 239 S.E.2d 415 (1977), decided under this section as it stood before the 1977, 2nd Sess., amendment.

The last sentence of subsection (b) did not extend the scope of § 143-318.2. *Student Bar Ass'n Bd. of Governors v. Byrd*, 293 N.C. 594, 239 S.E.2d 415 (1977), decided under this section and § 143-318.2 as they stood before the 1977, 2nd Sess., amendments.

Purpose of Subsection (c). — Subsection (c) was inserted out of an abundance of caution so as to prevent members of a board of education from being afraid to act promptly in an emergency. *Student Bar Ass'n Bd. of Governors v. Byrd*, 293 N.C. 594, 239 S.E.2d 415 (1977), decided under this section as it stood before the 1977, 2nd Sess., amendment.

Subsection (c) does not indicate legislative intent to broaden the scope of § 143-318.2. *Student Bar Ass'n Bd. of Governors v. Byrd*, 293 N.C. 594, 239 S.E.2d 415 (1977), decided under this section and § 143-318.2 as they stood before the 1977, 2nd Sess., amendments.

§ 143-318.4. Exceptions. — The agencies or groups following are excluded from the provisions of G.S. 143-318.2:

- (3) The Department of Correction.
- (4) The Judicial Standards Commission.
- (9) Every board, commission, council or other body, or any committee thereof, authorized by statute to investigate, examine and determine the character and other qualifications of applicants for license to practice any occupation or profession in this State, or authorized to suspend or revoke licenses of, or to reprimand or take disciplinary action concerning any person licensed to engage in the practice of any occupation or profession in this State; provided, however, that nothing in this Article shall be construed to amend, repeal or supersede any statute, now existing or hereafter enacted, which requires a public hearing or other practice and procedure in any proceeding before any such board, commission or other body, or any committee thereof.
- (11) Any public body that is specifically authorized or directed by law to meet in executive or confidential session, to the extent of the authorization or direction. (1971, c. 638, s. 1; 1973, c. 1262, s. 10; 1977, 2nd Sess., c. 1191, s. 4.)

Editor's Note. —

The 1977, 2nd Sess., amendment, effective Oct. 1, 1978, deleted "N.C. State" preceding "Department" in subdivision (3), substituted "Judicial Standards Commission" for "State

Department of Correction" in subdivision (4), deleted "board enumerated in G.S. 150-9 and every" preceding "board, commission," near the beginning of subdivision (9), inserted "occupation or" in two places in the part of

subdivision (9) preceding the proviso and added amendment are set out.
subdivision (11).

Only the introductory language and the administrative law, see 55 N.C.L. Rev. 898
subdivisions added or changed by the (1977).

§ 143-318.8. Public notice of official meetings. — (a) If a public body has established, by ordinance, resolution, or otherwise, a schedule of regular meetings, it shall cause a current copy of that schedule, showing the time and place of regular meetings, to be kept on file as follows:

- (1) For public bodies that are part of State government, with the Secretary of State;
- (2) For the governing board and each other public body that is part of a county government, with the clerk to the board of county commissioners;
- (3) For the governing board and each other public body that is part of a city government, with the city clerk;
- (4) For each other public body, with its clerk or secretary, or, if the public body does not have a clerk or secretary, with the clerk to the board of county commissioners in the county in which the public body normally holds its meetings.

If a public body changes its schedule of regular meetings, it shall cause the revised schedule to be filed as provided in subdivisions (1) through (4) of this subsection at least seven calendar days before the day of the first meeting held pursuant to the revised schedule.

(b) If a public body holds an official meeting at any time or place other than a time or place shown on the schedule filed pursuant to subsection (a) of this section, it shall give public notice of the time and place of that meeting as provided in this subsection.

- (1) If a meeting is an adjourned or recessed session of a regular meeting or of some other meeting, notice of which has been given pursuant to this subsection, and the time and place of the adjourned or recessed session has been set during the regular or other meeting, no further notice is necessary.
- (2) For any other meeting, except an emergency meeting, the public body shall cause written notice of the meeting (i) to be posted on the principal bulletin board of the public body or, if the public body has no such bulletin board, at the door of its usual meeting room, and (ii) to be mailed or delivered to each newspaper, wire service, radio station, and television station that has filed a written request for notice with the clerk or secretary of the public body or with some other person designated by the public body. This notice shall be posted and mailed or delivered at least 48 hours before the time of the meeting. The public body may require each newspaper, wire service, radio station, and television station submitting a written request for notice to renew the request annually and may charge a reasonable fee, not to exceed ten dollars (\$10.00) annually, to cover the cost of mailed or delivered notice.
- (3) For an emergency meeting, the public body shall cause notice of the meeting to be given to each local newspaper, local wire service, local radio station, and local television station that has filed a written request, which includes the newspaper's, wire service's, or station's telephone number, for emergency notice with the clerk or secretary of the public body or with some other person designated by the public body. This notice shall be given either by telephone or by the same method used to notify the members of the public body and shall be given immediately after the notice has been given to those members. This notice shall be given at the expense of the party notified. An "emergency meeting" is one called because of generally unexpected

circumstances that require immediate consideration by the public body. Only business connected with the emergency may be considered at a meeting to which notice is given pursuant to this subdivision.

(c) This section does not apply to the General Assembly. Each house of the General Assembly shall provide by rule for notice of meetings of legislative committees and subcommittees. (1977, 2nd Sess., c. 1191, s. 5.)

Editor's Note. — Session Laws 1977, 2nd Sess., c. 1191, s. 9, makes this section effective Oct. 1, 1978.

ARTICLE 36.

Department of Administration.

§ 143-342.1. State-owned office space; fees for use by self-supporting agencies. — The Department shall determine equitable fees for the use of State owned and operated office space, and it shall assess all self-supporting agencies using any of this office space for payment of these fees. For the purposes of this section, self-supporting agencies are those agencies designated by the Advisory Budget Commission as being primarily funded from sources other than State appropriations. Fees assessed under this section shall be paid to the Department. (1977, 2nd Sess., c. 1219, s. 48.)

Editor's Note. — Session Laws 1977, 2nd Sess., c. 1219, s. 59, makes the act effective July 1, 1978.

Session Laws 1977, 2nd Sess., c. 1219, s. 57, contains a severability clause.

Chapter 143A.

State Government Reorganization.

Article 1.

General Provisions.

Sec.

143A-17. Plans and reports.

Article 3.

Department of State Auditor.

143A-28. [Repealed.]

Article 4.

Department of State Treasurer.

Sec.

143A-38.1. The Law-Enforcement Officers' Benefit and Retirement Fund; transfer.

ARTICLE 1.

General Provisions.

§ 143A-17. **Plans and reports.** — Each principal department shall submit an annual plan of work to the Governor and the Advisory Budget Commission prior to the beginning of each fiscal year. Each department which plans to include in its budget request for the ensuing fiscal period a request for (i) the establishment of a new program regardless of the source of the supporting funds, or (ii) the State funding of a program which was previously supported from nonstate sources, shall provide in its annual plan of work measurement criteria for the determination of the success or failure of each such program requested. Each principal department shall submit an annual report covering programs and activities to the Governor and Advisory Budget Commission at the end of each fiscal year. These plans of work and annual reports shall be made available to the General Assembly. These documents will serve as the base for the development of budgets for each principal department of the State government to be submitted to the Governor, Advisory Budget Commission, and to the appropriations committees of the General Assembly for consideration and approval. (1971, c. 864, s. 21; 1977, 2nd Sess., c. 1219, s. 44.)

Editor's Note. — The 1977, 2nd Sess., amendment, effective July 1, 1978, added the second sentence, inserted "the" preceding "State" in the last sentence and inserted "the appropriations committees of" near the end of

the last sentence (formerly the second paragraph of the section).

Session Laws 1977, 2nd Sess., c. 1219, s. 57, contains a severability clause.

ARTICLE 3.

Department of State Auditor.

§ 143A-28: Repealed by Session Laws 1977, 2nd Sess., c. 1204, s. 2, effective July 1, 1978.

Cross Reference. — As to transfer of the Law Enforcement Officers' Benefit and Retirement Fund to the Department of State Treasurer, see § 143A-38.1.

ARTICLE 4.

Department of State Treasurer.

§ 143A-38.1. **The Law-Enforcement Officers' Benefit and Retirement Fund; transfer.** — The Law-Enforcement Officers' Benefit and Retirement Fund, as contained in Article 12 of Chapter 143 of the General Statutes and the laws of this State, is hereby transferred by a Type II transfer to the Department of State Treasurer. (1977, 2nd Sess., c. 1204, s. 1.)

Editor's Note. — Session Laws 1977, 2nd Sess., c. 1204, s. 4, makes the act effective Jan. 1, 1978.

Chapter 143B.**Executive Organization Act of 1973.****Article 1.****General Provisions.**

Sec.

143B-10. Powers and duties of heads of principal departments.

Article 3.**Department of Human Resources.**

Part 6. Social Services Commission.

143B-153. Social Services Commission — creation, powers and duties.

Article 9.**Department of Administration.**

Part 15. North Carolina State Commission of Indian Affairs.

143B-404. North Carolina State Commission of Indian Affairs — creation; name.

Sec.

143B-405. North Carolina State Commission of Indian Affairs — purposes for creation.

143B-406. North Carolina State Commission of Indian Affairs — duties; use of funds.

143B-407. North Carolina State Commission of Indian Affairs — membership; term of office; chairman; compensation.

143B-408. North Carolina State Commission of Indian Affairs — meetings; quorum; proxy vote.

143B-409. North Carolina State Commission of Indian Affairs — reports.

143B-410. North Carolina State Commission of Indian Affairs — fiscal records; clerical staff.

143B-411. North Carolina State Commission of Indian Affairs — executive director; employees.

ARTICLE 1.*General Provisions.***§ 143B-10. Powers and duties of heads of principal departments.**

(d) The head of each principal department may create and appoint committees or councils to consult with and advise the department. Except as required by State or federal law, such committees or councils shall consist of no more than 10 members unless the approval of the Advisory Budget Commission is obtained to exceed that number. The members of any committee or council created by the head of a principal department shall serve at the pleasure of the head of the principal department and may be paid per diem and necessary travel and subsistence expenses within the limits of appropriations and in accordance with the provisions of G.S. 138-5, when approved in advance by the Advisory Budget Commission. Per diem, travel, and subsistence payments to members of the committees or councils created in connection with federal programs shall be paid from federal funds unless otherwise provided by law.

An annual report listing these committees or councils, the total membership on each, the cost in the last 12 months and the source of funding, and the title of the person who made the appointments shall be made to the Advisory Budget Commission and the Joint Legislative Commission on Governmental Operations by March 31 of each year.

(1977, 2nd Sess., c. 1219, s. 46.)

Editor's Note. — The 1977, 2nd Sess., amendment, effective July 1, 1978, in the first paragraph of subsection (d), added the second and fourth sentences and inserted "in advance" near the end of the third sentence. The amendment also added the second paragraph of subsection (d).

Session Laws 1977, 2nd Sess., c. 1219, s. 57, contains a severability clause.

As the rest of the section was not changed by the amendment, only subsection (d) is set out.

ARTICLE 3.

Department of Human Resources.

Part 6. Social Services Commission.

§ 143B-153. Social Services Commission — creation, powers and duties. —

There is hereby created the Social Services Commission of the Department of Human Resources with the power and duty to adopt rules and regulations to be followed in the conduct of the State's social service programs with the power and duty to adopt, amend, and rescind rules and regulations under and not inconsistent with the laws of the State necessary to carry out the provisions and purposes of this Article. Provided, however, the Department of Human Resources shall have the power and duty to adopt rules and regulations to be followed in the conduct of the State's medical assistance program.

(2) The Social Services Commission shall have the power and duty to establish standards and adopt rules and regulations:

- a. For the programs of public assistance established by federal legislation and by Article 2 of Chapter 108 of the General Statutes of the State of North Carolina with the exception of the program of medical assistance established by G.S. 108-23(b);
- b. To achieve maximum cooperation with other agencies of the State and with agencies of other states and of the federal government in rendering services to strengthen and maintain family life and to help recipients of public assistance obtain self-support and self-care; and
- c. For the placement and supervision of dependent and delinquent children and payment of necessary costs of foster home care for needy and homeless children as provided by G.S. 108-66.

(1977, 2nd Sess., c. 1219, ss. 26, 27.)

Editor's Note. —

The 1977, 2nd Sess., amendment, effective July 1, 1978, added the second sentence of the introductory paragraph and added "with the exception of the program of medical assistance established by G.S. 108-23(b)" at the end of paragraph (a) of subdivision (2).

Session Laws 1977, 2nd Sess., c. 1219, s. 28, provides: "All standards, rules, regulations, determinations, and decisions relating to medical assistance and the medical assistance program

adopted before July 1, 1978, by the Social Services Commission and its predecessors shall remain in full force and effect unless and until repealed or superseded by action of the Department of Human Resources."

Session Laws 1977, 2nd Sess., c. 1219, s. 57, contains a severability clause.

As the rest of the section was not changed by the amendment, only the introductory paragraph and subdivision (2) are set out.

ARTICLE 9.

Department of Administration.

Part 15. North Carolina State Commission of Indian Affairs.

§ 143B-404. North Carolina State Commission of Indian Affairs — creation; name. — There is hereby created and established the North Carolina State Commission of Indian Affairs. The commission shall be administered under the direction and supervision of the Department of Administration pursuant to G.S. 143A-6(b) and (c). (1977, c. 849, s. 1; 1977, 2nd Sess., c. 1189.)

Editor's Note. — The 1977, 2nd Sess., amendment deleted "a commission to be known as" following "established" near the beginning

of the first sentence, deleted "of the Department of Administration" at the end of the first sentence and added the second sentence.

§ 143B-405. North Carolina State Commission of Indian Affairs — purposes for creation. — The purposes of the commission shall be to deal fairly and effectively with Indian affairs; to bring local, State, and federal resources into focus for the implementation or continuation of meaningful programs for Indian citizens of the State of North Carolina; to provide aid and protection for Indians as needs are demonstrated; to prevent undue hardships; to assist Indian communities in social and economic development; and to promote recognition of and the right of Indians to pursue cultural and religious traditions considered by them to be sacred and meaningful to Native Americans. (1977, c. 849, s. 1; 1977, 2nd Sess., c. 1189.)

Editor's Note. — The 1977, 2nd Sess., amendment reenacted this section without change.

§ 143B-406. North Carolina State Commission of Indian Affairs — duties; use of funds. — It shall be the duty of the commission to study, consider, accumulate, compile, assemble and disseminate information on any aspect of Indian affairs; to investigate relief needs of Indians of North Carolina and to provide technical assistance in the preparation of plans for the alleviation of such needs; to confer with appropriate officials of local, State and federal governments and agencies of these governments, and with such congressional committees that may be concerned with Indian affairs to encourage and implement coordination of applicable resources to meet the needs of Indians in North Carolina; to cooperate with and secure the assistance of the local, State and federal governments or any agencies thereof in formulating any such programs, and to coordinate such programs with any programs regarding Indian affairs adopted or planned by the federal government to the end that the State Commission of Indian Affairs secure the full benefit of such programs; to review all proposed or pending State legislation and amendments to existing State legislation affecting Indians in North Carolina; to conduct public hearings on matters relating to Indian affairs and to subpoena any information or documents deemed necessary by the commission; to study the existing status of recognition of all Indian groups, tribes and communities presently existing in the State of North Carolina; to establish appropriate procedures to provide for legal recognition by the State of presently unrecognized groups; to provide for official State recognition by the commission of such groups; and to initiate procedures for their recognition by the federal government. (1977, c. 849, s. 1; 1977, 2nd Sess., c. 1189.)

Editor's Note. — The 1977, 2nd Sess., amendment inserted "to provide for official State recognition by the commission of such groups" near the end of the section and made certain minor changes in punctuation and wording throughout the section.

§ 143B-407. North Carolina State Commission of Indian Affairs — membership; term of office; chairman; compensation. — (a) The State Commission of Indian Affairs shall consist of the Speaker of the House of Representatives, the Lieutenant Governor, the Secretary of Human Resources, the Director of the State Employment Security Commission, the Secretary of Administration, the Secretary of Natural Resources and Community Development, the Commissioner of Labor or their designees and 15 representatives of the Indian community. These 15 Indian members shall be selected by tribal or community consent from the Indian groups that are recognized by the State of North Carolina and are principally geographically located as follows: the Coharie of Sampson and Harnett Counties; the Haliwa of Halifax, Warren, and adjoining counties; the Lumbees of Robeson, Hoke and

Scotland Counties; the Waccamaw-Siouan from Columbus and Bladen Counties; and the Native Americans located in Cumberland, Guilford and Mecklenburg Counties. The Coharie shall have two members; the Haliwa, two; the Lumbees, three; the Waccamaw-Siouan, two; the Cumberland County Association for Indian People, two; the Guilford Native Americans, two; the Metrolina Native Americans, two. If the Eastern Band of Cherokees should choose to participate, then they shall have two members on the commission thereby bringing the total Indian membership to 17.

(b) Members serving by virtue of their office within State government shall serve so long as they hold that office. Members representing Indian tribes and groups shall be elected by the tribe or group concerned and shall serve for three-year terms except that at the first election of commission members by tribes and groups one member from each tribe or group shall be elected to a one-year term, one member from each tribe or group to a two-year term, and one member from the Lumbees to a three-year term. Thereafter, all commission members will be elected to three-year terms. All members shall hold their offices until their successors are appointed and qualified. Vacancies occurring on the commission shall be filled by the tribal council or governing body concerned. Any member appointed to fill a vacancy shall be appointed for the remainder of the term of the member causing the vacancy. The Governor shall appoint a chairman of the commission from among the Indian members of the commission, subject to ratification by the full commission.

(c) Commission members who are seated by virtue of their office within the State government shall be compensated at the rate specified in G.S. 138-6. Commission members who are members of the General Assembly shall be compensated at the rate specified in G.S. 120-3.1. Indian members of the commission shall be compensated at the rate specified in G.S. 138-5. (1977, c. 771, s. 4; c. 849, s. 1; 1977, 2nd Sess., c. 1189.)

Editor's Note. —

The 1977, 2nd Sess., amendment added "or their designees and 15 representatives of the Indian community" at the end of the first sentence of subsection (a) and rewrote the

remainder of subsection (a). In subsection (b), the amendment substituted "the Lumbees" for "each tribe or group" near the end of the second sentence and inserted "all" near the beginning of the third sentence.

§ 143B-408. North Carolina State Commission of Indian Affairs — meetings; quorum; proxy vote. — (a) The commission shall meet quarterly, and at any other such time that it shall deem necessary. Meetings may be called by the chairman or by a petition signed by a majority of the members of the commission. Ten days' notice shall be given in writing prior to the meeting date.

(b) Simple majority of the Indian members of the commission must be present to constitute a quorum.

(c) Proxy vote shall not be permitted. (1977, c. 849, s. 1; 1977, 2nd Sess., c. 1189.)

Editor's Note. — The 1977, 2nd Sess., amendment deleted "and two members by virtue of their office within State government" following "commission" in subsection (b).

§ 143B-409. North Carolina State Commission of Indian Affairs — reports. — The commission shall prepare a written annual report giving an account of its proceedings, transactions, findings, and recommendations. This report shall be submitted to the Governor and the legislature. The report will become a matter of public record and will be maintained in the State Historical Archives. It may also be furnished to such other persons or agencies as the commission may deem proper. (1977, ch. 849, s. 1; 1977, 2nd Sess., c. 1189.)

Editor's Note. —

The 1977, 2nd Sess., amendment reenacted this section without change.

§ 143B-410. North Carolina State Commission of Indian Affairs — fiscal records; clerical staff. — Fiscal records shall be kept by the Secretary of Administration and will be subject to annual audit by a certified public accountant. The audit report will become a part of the annual report and will be submitted in accordance with the regulations governing preparation and submission of the annual report. (1977, c. 849, s. 1; 1977, 2nd Sess., c. 1189.)

Editor's Note. — The 1977, 2nd Sess., amendment reenacted this section without change.

§ 143B-411. North Carolina State Commission of Indian Affairs — executive director; employees. — The commission may, subject to legislative or other funds that would accrue to the commission, employ an executive director to carry out the day-to-day responsibilities and business of the commission. The executive director, also subject to legislative or other funds that would accrue to the commission, may hire additional staff and consultants to assist in the discharge of his responsibilities, as determined by the commission. The executive director shall not be a member of the commission, and shall be of Indian descent. (1977, c. 849, s. 1; 1977, 2nd Sess., c. 1189.)

Editor's Note. — The 1977, 2nd Sess., amendment substituted "shall be of Indian descent" for "should be of Indian extraction" at the end of the last sentence.

Chapter 146.**State Lands.****SUBCHAPTER I. UNALLOCATED STATE LANDS.****ARTICLE 1.***General Provisions.***§ 146-1. Intent of Subchapter.****Editor's Note. —**

For article, "Public Rights and Coastal Zone Management," see 51 N.C.L. Rev. 1 (1972).

ARTICLE 2.*Dispositions.***§ 146-3. What lands may be sold.****Editor's Note. —**

For article, "Public Rights and Coastal Zone Management," see 51 N.C.L. Rev. 1 (1972).

§ 146-4. Sales of certain lands; procedure; deeds; disposition of proceeds.

Editor's Note. — For article, "Public Rights and Coastal Zone Management," see 51 N.C.L. Rev. 1 (1972).

§ 146-6. Title to land raised from navigable water.

Editor's Note. — For article, "Public Rights and Coastal Zone Management," see 51 N.C.L. Rev. 1 (1972).

§ 146-12. Easements in lands covered by water.

Editor's Note. — For article, "Public Rights and Coastal Zone Management," see 51 N.C.L. Rev. 1 (1972).

Cited in MacDonald v. Newsome, 437 F. Supp. 796 (E.D.N.C. 1977).

SUBCHAPTER IV. MISCELLANEOUS.**ARTICLE 14.***General Provisions.***§ 146-64. Definitions.****Editor's Note. —**

For article, "Public Rights and Coastal Zone Management," see 51 N.C.L. Rev. 1 (1972).

Chapter 147.

State Officers.

Article 3.

The Governor.

Sec.

147-11. Salary and expense allowance of Governor; allowance to person designated to represent Governor's office.

Sec.

147-33. Compensation and expenses of Lieutenant Governor.

Article 5.

Auditor.

147-58. Duties and authority of State Auditor.

ARTICLE 3.

The Governor.

§ 147-11. Salary and expense allowance of Governor; allowance to person designated to represent Governor's office. — The salary of the Governor shall be forty-seven thousand seven hundred dollars (\$47,700) per annum, payable monthly. He shall be paid annually the sum of ten thousand dollars (\$10,000) as an expense allowance in attending to the business for the State and for expenses out of the State and in the State in representing the interest of the State and people, incident to the duties of his office, the said allowance to be paid monthly. In addition to the foregoing allowance, the actual expenses of the Governor while traveling outside the State on business incident to his office shall be paid by the State Treasurer on a warrant issued by the Auditor. Whenever a person who is not a State official or employee is designated by the Governor to represent the Governor's office, such person shall be paid actual travel expenses incurred in the performance of such duty; provided that the payment of such travel expense shall conform to the provisions of the biennial appropriation act in effect at the time the payment is made. (1879, c. 240; Code, s. 3720; 1901, c. 8; Rev., s. 2736; 1907, c. 1009; 1911, c. 89; 1917, cc. 11, 235; 1919, c. 320; C. S., s. 3858; 1929, c. 276, s. 1; 1947, c. 994; 1953, c. 1, s. 1; 1961, c. 1157; 1963, c. 1178, s. 1; 1965, c. 1091, s. 1; 1971, c. 1083, s. 1; 1973, c. 600; 1977, 2nd Sess., c. 1136, s. 39; c. 1249, s. 5.)

Editor's Note. — The first 1977, 2nd Sess., amendment, effective July 1, 1978, increased the amount of the expense allowance provided in the second sentence from \$5,000 to \$10,000.

The second 1977, 2nd Sess., amendment,

effective July 1, 1978, increased the Governor's salary from \$45,000 to \$47,700 per annum.

Session Laws 1977, 2nd Sess., c. 1136, s. 45, contains a severability clause.

§ 147-33. Compensation and expenses of Lieutenant Governor. — The salary of the Lieutenant Governor shall be the same as for superior court judges as set by the General Assembly in the Budget Appropriation Act. In addition to this salary, the Lieutenant Governor shall be paid an annual expense allowance in the sum of ten thousand dollars (\$10,000). (1911, c. 103; C. S., s. 3862; 1945, c. 1; 1953, c. 1, s. 1; 1963, c. 1050; 1967, c. 1170, s. 1; 1971, c. 913; 1977, c. 802, s. 42.6; 1977, 2nd Sess., c. 1136, s. 40.)

Editor's Note. —

The 1977, 2nd Sess., amendment, effective July 1, 1978, increased the Lieutenant Governor's expense allowance from \$4,000 to \$10,000.

Session Laws 1977, 2nd Sess., c. 1136, s. 45, contains a severability clause.

ARTICLE 5.

Auditor.

§ 147-58. Duties and authority of State Auditor. — The duties and authority of the State Auditor shall be as follows:

(25) The Auditor is authorized to contract with federal audit agencies, or any governmental agency, on a cost reimbursable basis, for the Auditor to perform audits of federal grants and programs administered by the State departments and institutions in accordance with agreements negotiated between the Auditor and the contracting federal audit agencies or any governmental agency. In instances where the grantee State agency shall subgrant these federal funds to local governments, regional councils of government and other local groups or private or semiprivate institutions or agencies, the Auditor shall have the authority to examine the books and records of these subgrantees to the extent necessary to determine eligibility and proper use in accordance with State and federal laws and regulations.

The Auditor shall charge and collect from the contracting federal audit agencies, or any governmental agencies, the actual cost of all the audits of the grants and programs contracted by him to do. Amounts collected under these arrangements shall be deposited in the State Treasury and be budgeted in the Department of State Auditor and shall be available to hire sufficient personnel to perform these contracted audits and to pay for related travel, supplies and other necessary expenses. (1868-9, c. 270, ss. 63, 64, 65; 1883, c. 71; Code, s. 3350; Rev., s. 5365; 1919, c. 153; C. S., s. 7675; 1929, c. 268; 1951, c. 1010, s. 1; 1953, c. 61; 1955, c. 576; 1957, c. 269, s. 1; c. 390; 1969, c. 458, s. 1; 1973, c. 507, s. 5; c. 617, s. 3; c. 1211; c. 1415; 1975, c. 879, s. 46; 1977, c. 996, s. 2; c. 1029, s. 1; 1977, 2nd Sess., c. 1136, s. 36.)

Editor's Note. —

The 1977, 2nd Sess., amendment added subdivision (25).

As the rest of the section was not changed by

the amendment, only the introductory paragraph and subdivision (25) are set out.

Session Laws 1977, 2nd Sess., c. 1136, s. 45, contains a severability clause.

Chapter 148.

State Prison System.

Article 3.

Sec.

Labor of Prisoners.

offenders and revocation of such parole.

Sec.

148-33.2. Restitution by prisoners with work-release privileges.

148-37. Additional facilities authorized; contractual arrangements.

Article 4.

Paroles.

148-57.1. Restitution as a condition of parole.

Article 3B.

Facilities and Programs for Youthful Offenders.

148-49.16. Supervision of paroled youthful

ARTICLE 2.

Prison Regulations.

§ 148-12. Diagnostic and classification programs.

Editor's Note. —

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this

act regarding parole shall not apply to persons sentenced before July 1, 1978."

Judge Other Than Trial Judge May Impose Sentence. — Where sentencing was delayed for the purpose of a diagnostic evaluation of the defendant under this section, it was not error for a judge other than the trial judge to impose sentence upon the defendant. *State v. Sampson*, 34 N.C. App. 305, 237 S.E.2d 883 (1977).

ARTICLE 3.

Labor of Prisoners.

§ 148-28. Sentencing prisoners to Central Prison; youthful offenders.

Editor's Note. —

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without

regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

§ 148-29. Transportation of convicts to prison; sheriff's expense affidavit; State not liable for maintenance expenses until convict received.

Editor's Note. —

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without

regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

§ 148-30. Repealed by Session Laws 1977, c. 711, s. 33, effective July 1, 1978.

Editor's Note. —

Session Laws 1977, c. 711, s. 39, as amended

by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall

become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered

against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

§ 148-33.1. Sentencing, quartering, and control of prisoners with work-release privileges.

Editor's Note. —

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without

regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

§ 148-33.2. Restitution by prisoners with work-release privileges.

(c) When an active sentence is imposed, the court shall consider whether, as a further rehabilitative measure, restitution or reparation should be ordered or recommended to the Parole Commission and the Secretary of Correction to be imposed as a condition of attaining work-release privileges. If the court determines that restitution or reparation should not be ordered or recommended as a condition of attaining work-release privileges, it shall so indicate on the commitment. If, however, the court determines that restitution or reparation should be ordered or recommended as a condition of attaining work-release privileges, it shall make its order or recommendation a part of the order committing the defendant to custody. The order or recommendation shall be in accordance with the applicable provisions of G.S. 15A-1343(d). The Administrative Office of the Courts shall prepare and distribute forms which provide ample space to make restitution or reparation orders or recommendations incident to commitments, which forms shall be conveniently structured to enable the sentencing court to make its order or recommendation.

(1977, 2nd Sess., c. 1147, s. 33.)

Editor's Note. —

The 1977, 2nd Sess., amendment, effective July 1, 1978, substituted "G.S. 15A-1343(d)" for "G.S. 15-199(10)" in the fourth sentence of subsection (c).

As the rest of the section was not changed by the amendment, only subsection (c) is set out.

§ 148-37. Additional facilities authorized; contractual arrangements.

(b) The Secretary of Correction may contract with the proper official of the United States or of any county or city of this State for the confinement of federal prisoners after they have been sentenced, county, or city prisoners in facilities of the State prison system or for the confinement of State prisoners in any county or any city facility located in North Carolina, or any facility of the United States Bureau of Prisons, when to do so would most economically and effectively promote the purposes served by the Department of Correction. Any contract made under the authority of this section shall be for a period of not more than two years, and shall be renewable from time to time for a period not to exceed two years. Contracts for receiving federal, county and city prisoners shall provide for reimbursing the State in full for all costs involved. The financial provisions shall have the approval of the Department of Administration before the contract is executed. Payments received under such contracts shall be deposited in the State treasury for the use of the State Department of Correction. Such payments are hereby appropriated to the State Department of Correction as a supplementary fund to compensate for the additional care and

maintenance of such prisoners as are received under such contracts. (1933, c. 172, s. 19; 1957, c. 349, s. 10; 1967, c. 996, s. 8; 1973, c. 1262, s. 10; 1975, c. 879, s. 46; 1977, 2nd Sess., c. 1147, s. 34.)

Editor's Note. —

The 1977, 2nd Sess., amendment, effective July 1, 1978, substituted "any county or any city facility located in North Carolina, or any facility of the United States Bureau of Prisons" for

"federal, county or city facilities located in North Carolina" in the first sentence of subsection (b).

As subsection (a) was not changed by the amendment, it is not set out.

§ 148-42: Repealed by Session Laws 1977, c. 711, s. 33, effective July 1, 1978.

Editor's Note. —

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without

regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

ARTICLE 3B.

Facilities and Programs for Youthful Offenders.

§ 148-49.10. Purposes of Article.

The purpose of this Article as stated in this section is the same purpose stated in former § 148-49.1 of the old Article 3A. *State v. Niccum*, 293 N.C. 276, 238 S.E.2d 141 (1977).

Rights accrued by persons under Repealed Article 3A remain unaffected. *State v. Niccum*, 293 N.C. 276, 238 S.E.2d 141 (1977).

Article Not Applicable Where Death or a Life Sentence Mandatory. — Neither former

Article 3A (repealed) nor this Article of Chapter 148 was intended to apply to convictions or pleas of guilty of crimes for which death or a life sentence is the mandatory punishment. *State v. Niccum*, 293 N.C. 276, 238 S.E.2d 141 (1977); *State v. Mathis*, 293 N.C. 660, 239 S.E.2d 245 (1977); *State v. Foster*, 293 N.C. 674, 239 S.E.2d 449 (1977).

§ 148-49.11. Definitions.

Quoted in *State v. Niccum*, 293 N.C. 276, 238 S.E.2d 141 (1977).

§ 148-49.12. Treatment of youthful offenders.

Stated in *State v. Niccum*, 293 N.C. 276, 238 S.E.2d 141 (1977).

§ 148-49.14. Sentencing committed youthful offenders.

Quoted in *State v. Niccum*, 293 N.C. 276, 238 S.E.2d 141 (1977).

Cited in *State v. Locklear*, 294 N.C. 210, 241 S.E.2d 65 (1978).

§ 148-49.15. Parole of committed youthful offenders.

Stated in *State v. Niccum*, 293 N.C. 276, 238 S.E.2d 141 (1977).

§ 148-49.16. Supervision of paroled youthful offenders and revocation of such parole.

(b) If at any time before unconditional discharge of a youthful offender the Parole Commission is of the opinion that for proper reason parole should be revoked, revocation shall proceed under the provisions of Article 85 of Chapter 15A of the General Statutes. After revocation of parole, the Parole Commission may thereafter reinstate parole at such time as in the commission's discretion the youthful offender is ready for reinstatement. Notice to the Secretary of Correction of intent to reinstate parole shall not be required. (1967, c. 996, s. 10; 1973, c. 1262, s. 10; 1975, c. 89; c. 720, s. 2; 1977, c. 732, s. 2; 1977, 2nd Sess., c. 1147, s. 35.)

Editor's Note. —

The 1977, 2nd Sess., amendment, effective July 1, 1978, substituted "Article 85 of Chapter 15A of the General Statutes" for "Article 4 of

this Chapter" in the first sentence of subsection (b).

As subsection (a) was not changed by the amendment, it is not set out.

ARTICLE 4.

Paroles.

§ 148-53. Investigators and investigations of cases of prisoners.

Editor's Note. —

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without

regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

§ 148-57.1. Restitution as a condition of parole.

(c) When an active sentence is imposed, the court shall consider whether, as a rehabilitative measure, restitution or reparation should be ordered or recommended to the Parole Commission to be imposed as a condition of parole. If the court determines that restitution or reparation should not be ordered or recommended as a condition of parole, it shall so indicate on the commitment. If, however, the court determines that restitution or reparation should be ordered or recommended as a condition of parole, it shall make its order or recommendation a part of the order committing the defendant to custody. The order or recommendation shall be in accordance with the applicable provisions of G.S. 15A-1343(d). The Administrative Office of the Courts shall prepare and distribute forms which provide ample space to make restitution or reparation orders or recommendations incident to commitments, which forms shall be conveniently structured to enable the sentencing court to make its order or recommendation.

(1977, 2nd Sess., c. 1147, s. 36.)

Editor's Note. —

The 1977, 2nd Sess., amendment, effective July 1, 1978, substituted "G.S. 15A-1343(d)" for "G.S. 15-199(10)" at the end of the fourth sentence of subsection (c).

As the rest of the section was not changed by the amendment, only subsection (c) is set out.

§§ 148-58, 148-58.1: Repealed by Session Laws 1977, c. 711, s. 33, effective July 1, 1978.

Editor's Note. —

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without

regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

§ 148-60: Repealed by Session Laws 1977, c. 711, s. 33, effective July 1, 1978.

Editor's Note. —

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without

regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

§§ 148-60.2 to 148-62: Repealed by Session Laws 1977, c. 711, s. 33, effective July 1, 1978.

Editor's Note. —

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without

regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

Chapter 150A.**Administrative Procedure Act.****ARTICLE 1.***General Provisions.***§ 150A-1. Scope and policy.****Editor's Note. —**

For an interpretative analysis of the

Administrative Procedure Act, see 53 N.C.L. Rev. 833 (1975).

ARTICLE 3.*Administrative Hearings.***§ 150A-23. Hearing required; notice; intervention.****Editor's Note. —**

For survey of 1976 case law dealing with

administrative law, see 55 N.C.L. Rev. 898 (1977).

§ 150A-29. Rules of evidence.

Board of Adjustment Not Required to Sound Record Hearings. — Municipal corporations are specifically excluded from the requirements of this section and § 150A-37 that trial rules of evidence and production of evidence be followed in proceeding before State agencies. Thus a Board of Adjustment is not required to sound

record its hearings. *Washington Park Neighborhood Ass'n v. Winston-Salem Zoning Bd. of Adjustment*, 35 N.C. App. 449, 241 S.E.2d 872 (1978).

Cited in *Occidental Life Ins. Co. v. Ingram*, 34 N.C. App. 619, 240 S.E.2d 460 (1977).

§ 150A-30. Official notice.

Cited in *Occidental Life Ins. Co. v. Ingram*, 34 N.C. App. 619, 240 S.E.2d 460 (1977).

§ 150A-37. Official record.

Board of Adjustment Not Required to Sound-Record Hearings. — Municipal corporations are specifically excluded from the requirements of this section and § 150A-29 that trial rules of evidence and production of evidence be followed in proceeding before State

agencies. Thus a Board of Adjustment is not required to sound-record its hearings. *Washington Park Neighborhood Ass'n v. Winston-Salem Zoning Bd. of Adjustment*, 35 N.C. App. 449, 241 S.E.2d 872 (1978).

ARTICLE 4.*Judicial Review.***§ 150A-43. Right to judicial review.****Editor's Note. —**

For survey of 1976 case law dealing with administrative law, see 55 N.C.L. Rev. 898 (1977).

"Adequate procedure for judicial review," as those words appear in this section, exists only if the scope of review is equal to that under

present Article 4 of this Chapter. *Occidental Life Ins. Co. v. Ingram*, 34 N.C. App. 619, 240 S.E.2d 460 (1977).

Cited in *Washington Park Neighborhood Ass'n v. Winston-Salem Zoning Bd. of Adjustment*, 35 N.C. App. 449, 241 S.E.2d 872 (1978).

§ 150A-51. Scope of review; power of court in disposing of case.

Scope of Review Here Applied as Broader Than in § 58-9.3. — Since the scope of review provided in this Article is substantially broader than that provided by § 58-9.3, the scope of judicial review applicable to a denial by the commissioner of insurance of a plan by a domestic insurance company to reorganize under a holding company structure was that provided for in this Article. *Occidental Life Ins. Co. v. Ingram*, 34 N.C. App. 619, 240 S.E.2d 460 (1977).

Issuance of Injunction Requiring Insurance Commissioner to Act. — The trial court did not exceed its power and authority by issuing its mandatory injunction requiring the commissioner of insurance to approve a domestic insurance corporation's plan to reorganize under a holding company structure where the commissioner acted arbitrarily and capriciously when he disapproved the plan. *Occidental Life Ins. Co. v. Ingram*, 34 N.C. App. 619, 240 S.E.2d 460 (1977).

§ 150A-52. Appeal to appellate division; obtaining stay of court's decision.

Appeal Must Follow Theory of the Trial. — Where petitioner relied upon jurisdiction under this section before the trial court, petitioner on appeal could not argue that the trial court had original subject matter jurisdiction pursuant to § 7A-240 based upon a constitutional right to a

hearing and judicial review, since an appeal has to follow the theory of the trial. *Grissom v. North Carolina Dep't of Revenue*, 34 N.C. App. 381, 238 S.E.2d 311 (1977) (Decided under former § 143-314).

(1977, 2nd Sess., c. 1191, § 6.)

Editor's Note. — The 1977, 2nd Sess. amendment affecting G.S. 1, 1973, added the third paragraph of subsection (b).

As substituted to and of were not changed by

the amendment, they are not set out.

Cited in *MacDonald v. Newton*, 157 F. Supp. 790 (E.D.N.C. 1977).

§ 153A-45. Adoption of ordinances.

Cited in *MacDonald v. Newton*, 157 F. Supp. 790 (E.D.N.C. 1977).

ARTICLE 6.

Delegation and Exercise of the General Police Power.

§ 153A-131. General ordinance-making power.

Editor's Note. — For article, "Regulating Offenses Through

Use Power to Enforce and Abate Nuisances," see 14 Wake Forest L. Rev. 1 (1978).

Chapter 152.

Coroners.

§ 152-1. Election; vacancies in office; appointment by clerk in special cases.

Local Modification. — Tyrrell (office of coroner reestablished): 1977, 2nd Sess., c. 1172, repealing 1975, c. 96.

§ 152A-35. Official notice.

Cited in *Occidental Life Ins. Co. v. Ingram*, 34 N.C. App. 419, 240 S.E.2d 490 (1977).

§ 152A-37. Official record.

Board of Adjustment Not Required in Special District Hearings. — Municipal ordinances are not preempted or specifically excluded from the scope of review of the Board of Adjustment. The Board of Adjustment is not required to review the ordinance before State agencies. Thus a Board of Adjustment is not required to review the ordinance before State agencies.

agencies. Thus a Board of Adjustment is not required to review the ordinance before State agencies. Thus a Board of Adjustment is not required to review the ordinance before State agencies.

ARTICLE 4.

Judicial Review.

§ 160A-43. Right to judicial review.

Editor's Note. —

For survey of 1975 case law dealing with administrative law, see 53 N.C.L. Rev. 525 (1977).

"Although a procedure for judicial review of these orders appear in this section, it is not the scope of review is equal to that under

present Article 4 of this Chapter. *Occidental Life Ins. Co. v. Ingram*, 34 N.C. App. 419, 240 S.E.2d 490 (1977).

Cited in *Washington Park Neighborhood Ass'n v. Wakefield-Zoning Bd. of Adjustment*, 32 N.C. App. 449, 241 S.E.2d 875 (1978).

Chapter 153A.

Counties.

Article 4.

Form of Government.

Part 3. Organization and Procedures of the Board of Commissioners.

Sec.

153A-40. Regular and special meetings.

ARTICLE 4.

Form of Government.

Part 3. Organization and Procedures of the Board of Commissioners.

§ 153A-40. Regular and special meetings.

(b) The chairman or a majority of the members of the board may at any time call a special meeting of the board of commissioners by signing a written notice stating the time and place of the meeting and the subjects to be considered. The person or persons calling the meeting shall cause the notice to be delivered to the chairman and each other member of the board or left at the usual dwelling place of each at least 48 hours before the meeting and shall cause a copy of the notice to be posted on the courthouse bulletin board at least 48 hours before the meeting. Only those items of business specified in the notice may be transacted at a special meeting, unless all members are present or those not present have signed a written waiver.

If a special meeting is called to deal with an emergency, the notice requirements of this subsection do not apply. However, the person or persons calling such a special meeting shall take reasonable action to inform the other members and the public of the meeting. Only business connected with the emergency may be discussed at a meeting called pursuant to this paragraph.

In addition to the procedures set out in this subsection, a person or persons calling a special or emergency meeting of the board of commissioners shall comply with the notice requirements of Article 33B of General Statutes Chapter 143.

(1977, 2nd Sess., c. 1191, s. 6.)

Editor's Note. — The 1977, 2nd Sess., amendment, effective Oct. 1, 1978, added the third paragraph of subsection (b).

As subsections (a) and (c) were not changed by

the amendment, they are not set out.

Cited in MacDonald v. Newsome, 437 F. Supp. 796 (E.D.N.C. 1977).

§ 153A-45. Adoption of ordinances.

Cited in MacDonald v. Newsome, 437 F. Supp. 796 (E.D.N.C. 1977).

ARTICLE 6.

Delegation and Exercise of the General Police Power.

§ 153A-121. General ordinance-making power.

Editor's Note. —

For article, "Regulating Obscenity Through

the Power to Define and Abate Nuisances," see 14 Wake Forest L. Rev. 1 (1978).

ARTICLE 8.

County Property.

Part 1. Acquisition of Property.

§ 153A-158. Power to acquire property.

Editor's Note. — For comment, "Urban Planning and Land Use Regulation: The Need for Consistency," see 14 Wake Forest L. Rev. 81 (1978).

ARTICLE 14.

*Libraries.***§ 153A-265. Library board of trustees.**

Local Modification. — Burke: 1977, 2nd Sess., c. 1168.

ARTICLE 18.

Planning and Regulation of Development.

Part 3. Zoning.

§ 153A-340. Grant of power.

Editor's Note. — For article discussing North Carolina special exception and zoning amendment cases, see 53 N.C.L. Rev. 925 (1975). For comment, "Urban Planning and Land Use Regulation: The Need for Consistency," see 14 Wake Forest L. Rev. 81 (1978).

§ 153A-344. Planning agency; zoning plan; certification to board of commissioners; amendments.

Editor's Note. — For article discussing North Carolina special exception and zoning amendment cases, see 53 N.C.L. Rev. 925 (1975).

§ 153A-345. Board of adjustment.

Editor's Note. — For article discussing North Carolina special exception and zoning amendment cases, see 53 N.C.L. Rev. 925 (1975).

Part 4. Building Inspection.

§ 153A-350. "Building" defined.

Editor's Note. — For comment, "Urban Planning and Land Use Regulation: The Need for Consistency," see 14 Wake Forest L. Rev. 81 (1978).

ARTICLE 19.

*Regional Planning Commissions.***§ 153A-391. Creation; admission of new members.**

Stated in Hyde v. Land-Of-Sky Regional Council, 572 F.2d 988 (4th Cir. 1978).

ARTICLE 23.

*Miscellaneous Provisions.***§ 153A-435. Liability insurance; damage suits against a county involving governmental functions.**

Cited in Vaughn v. County of Durham, Durham County Dep't of Social Servs., 34 N.C. App. 416, 240 S.E.2d 456 (1977).

Chapter 156.**Drainage.****SUBCHAPTER III. DRAINAGE DISTRICTS.****ARTICLE 5.***Establishment of Districts.***§ 156-54. Jurisdiction to establish districts.****Cross reference. —**

As to application to the State Soil and Water Conservation Commission for grants for

nonfederal costs relating to small watershed projects authorized under Public Law 566 (83rd Congress as amended), see § 139-53 et seq.

ARTICLE 13.*Planning and Regulation of Development.***Part 3. Zoning.****§ 153A-340. Grant of power.****Editor's Note. —**

For article describing North Carolina special exception and zoning amendment rules, see 33 N.C.L. Rev. 293 (1978).

Commentary, "Urban Planning and Land Use Regulation: The Need for Consistency," see 14 Wake Forest L. Rev. 31 (1978).

§ 153A-341. Planning agency; zoning plan; certification to board of commissioners; amendments.

Editor's Note. — For article describing North Carolina special exception and zoning amendment rules, see 33 N.C.L. Rev. 293 (1978).

§ 153A-342. Board of adjustment.

Editor's Note. — For article describing North Carolina special exception and zoning amendment rules, see 33 N.C.L. Rev. 293 (1978).

Part 4. Building Inspection.**§ 153A-383. "Building" defined.**

Editor's Note. — For comment, "Urban Planning and Land Use Regulation: The Need for Consistency," see 14 Wake Forest L. Rev. 31 (1978).

Chapter 157.

Housing Authorities and Projects.

ARTICLE 1.

Housing Authorities Law.

§ 157-1. Title of Article.

Editor's Note. —

For comment, "Urban Planning and Land

Use Regulation: The Need for Consistency,"
see 14 Wake Forest L. Rev. 81 (1978).

Chapter 159.**Local Government Finance.****SUBCHAPTER III. BUDGETS AND
FISCAL CONTROL.****Article 3.****The Local Government Budget
and Fiscal Control Act.****Part 5. Nonprofit Corporations
Receiving Public Funds.**

Sec.

159-40. Special regulations pertaining to nonprofit corporations receiving public funds.

**SUBCHAPTER IV. LONG-TERM
FINANCING.****Article 4.****Local Government Bond Act.****Part 2. Procedure for Issuing Bonds.**

Sec.

159-64. Within what time bonds may be issued.

SUBCHAPTER III. BUDGETS AND FISCAL CONTROL.**ARTICLE 3.***The Local Government Budget and Fiscal Control Act.***Part 5. Nonprofit Corporations Receiving Public Funds.****§ 159-40. Special regulations pertaining to nonprofit corporations receiving public funds.**

(e) The provisions of this section shall not apply to private, nonprofit corporations which are licensed or certified by the State of North Carolina and are fiscally accountable to agencies of the State of North Carolina or to agencies of local governmental units with which they have contracted for the provision of services. (1977, c. 687, s. 1; 1977, 2nd Sess., c. 1195, s. 1.)

Editor's Note. —

The 1977, 2nd Sess., amendment added subsection (e).

Session Laws 1977, 2nd Sess., c. 1195, s. 2, provides: "This act is effective upon ratification

and shall have retroactive application to July 1, 1977." The act was ratified June 16, 1978.

As the rest of the section was not changed by the amendment, only subsection (e) is set out.

SUBCHAPTER IV. LONG-TERM FINANCING.**ARTICLE 4.***Local Government Bond Act.***Part 2. Procedure for Issuing Bonds.**

§ 159-64. Within what time bonds may be issued. — Bonds may be issued under a bond order at any time within seven years after the order takes effect. When the issuance of bonds under any bond order is prevented or prohibited by any order of any court, the period of time within which bonds may be issued under the bond order in litigation shall be extended by the length of time elapsing between the date of institution of the action or proceeding and the date of its final disposition. When the issuance of bonds under any bond order, to finance public improvements in an area to be annexed, is prevented or prohibited by reason of litigation respecting the annexation and the Local Government

Commission shall certify to such effect, the period of time within which bonds may be issued under the bond order shall be extended by the length of time elapsing between the date of institution of the litigation and the date of its final disposition. The General Assembly may at any time prior to the expiration of the maximum time period herein provided extend the time for issuing bonds under bond orders.

When any such extension is granted, no further approval of the voters shall be required. (1917, c. 138, s. 24; 1919, c. 178, s. 3(24); C. S., s. 2950; 1921, c. 8, s. 1; Ex. Sess. 1921, c. 106, s. 1; 1927, c. 81, s. 32; 1939, c. 231, ss. 1, 2(d); 1947, c. 510, ss. 1, 2; 1949, c. 190, ss. 1, 2; 1951, c. 439, ss. 1, 2; 1953, c. 693, ss. 1, 3; 1955, c. 704, ss. 1, 2; 1969, c. 99; 1971, c. 780, s. 1; 1975, c. 545, s. 1; 1977, 2nd Sess., c. 1219, s. 36.)

Editor's Note. — Session Laws 1977, 2nd Sess., c. 1219, s. 57, The 1977, 2nd Sess., amendment, effective July 1, 1978, added the third sentence in the first paragraph contains a severability clause.

Chapter 159C.

Industrial and Pollution Control Facilities Financing Act.

Sec.

159C-3. Definitions.

§ 159C-1. Short title.

Cross reference. — For the North Carolina Industrial and Pollution Control Facilities Financing Authority Act, see § 159D-1 et seq.

§ 159C-3. Definitions. — The following terms, whenever used or referred to in this Chapter, shall have the following respective meanings, unless a different meaning clearly appears from the context:

(11) "Project" shall mean any land, equipment or any [one] or more buildings or other structures, whether or not on the same site or sites, and any rehabilitation, improvement, renovation or enlargement of, or any addition to, any building or structure for use as or in connection with (i) any industrial project for industry which project may be any industrial or manufacturing factory, mill, assembly plant or fabricating plant, or freight terminal, or industrial research, development or laboratory facility, or industrial processing facility or distribution facility for industrial or manufactured products, or (ii) any pollution control project for industry or for public utilities which project may be any air pollution control facility, water pollution control facility, or solid waste disposal facility in connection with any factory, mill or plant described in clause (i) of this subdivision or in connection with a public utility plant, or (iii) any combination of projects mentioned in clauses (i) and (ii) of this subdivision. Any project may include all appurtenances and incidental facilities such as land, headquarters or office facilities, warehouses, distribution centers, access roads, sidewalks, utilities, railway sidings, trucking and similar facilities, parking facilities, landing strips and other facilities for aircraft, waterways, docks, wharves and other improvements necessary or convenient for the construction, maintenance and operation of any building or structure, or addition thereto. (1977, 2nd Sess., c. 1197.)

Editor's Note. — The 1977, 2nd Sess., amendment added, in clause (i) of subdivision (11), the language beginning "or freight terminal" and ending "manufactured products."

As the rest of the section was not changed by the amendment, only the introductory language and subdivision (11) are set out.

Chapter 159D.

The North Carolina Industrial and Pollution Control Facilities Financing Authority Act.

Sec.	Sec.
159D-1. Short title.	159D-15. Construction contracts.
159D-2. Legislative findings and purposes.	159D-16. Conflict of interest.
159D-3. Definitions.	159D-17. Credit of State not pledged.
159D-4. Creation of the authority.	159D-18. Bonds eligible for investment.
159D-5. General powers.	159D-19. Revenue refunding bonds.
159D-6. Bonds.	159D-20. No power of eminent domain.
159D-7. Approval of project.	159D-21. Dissolution of the authority.
159D-8. Approval of bonds.	159D-22. Annual reports; application of Article 3, Subchapter III of Chapter 159.
159D-9. Sale of bonds.	159D-23. Application of Article 9 of Chapter 25.
159D-10. Location of projects.	159D-24. Officers not liable.
159D-11. Financing agreements.	159D-25. Additional method.
159D-12. Security documents.	159D-26. Liberal construction.
159D-13. Trust funds.	159D-27. Inconsistent laws inapplicable.
159D-14. Tax exemption.	

§ 159D-1. Short title. — This chapter may be referred to as “The North Carolina Industrial and Pollution Control Facilities Federal Program Financing Act.” (1977, 2nd Sess., c. 1198, s. 1.)

Editor's Note. — Session Laws 1977, 2nd Sess., c. 1198, s. 2, contains a severability clause.

§ 159D-2. Legislative findings and purposes.—(a) The General Assembly finds and determines that there exists in the State a critical condition of unemployment and a scarcity of employment opportunities; that the economic insecurity which results from such unemployment and scarcity of employment opportunities constitutes a serious menace to the safety, morals and general welfare of the entire State; that such unemployment and scarcity of employment opportunities have caused many workers and their families, including young adults upon whom future economic prosperity is dependent, to migrate elsewhere to find employment and establish homes; that such emigration has resulted in a reduced rate of growth in the tax base of the counties and other local governmental units of the State which impairs the financial ability of such counties and other local governmental units to support education and other local governmental services; that such unemployment results in obligations to grant public assistance and to pay unemployment compensation; that the aforesaid conditions can best be remedied by the attraction, stimulation, expansion and rehabilitation and revitalization of industrial and manufacturing facilities for industry in the State; and that there is a need to stimulate a larger flow of private investment funds into industrial building programs into [in] the State.

(b) The General Assembly further finds and determines that the development and expansion of industry within the State, which are essential to the economic growth of the State, and to the full employment and prosperity of its people, are accompanied by the increased production and discharge of gaseous, liquid, and solid pollution and wastes which threaten and endanger the health, welfare and safety of the inhabitants of the State by polluting the air, land and waters of the State; that in order to reduce, control, and prevent such environmental pollution, it is imperative that action be taken at various levels of government to require the provision of devices, equipment and facilities for the collection, reduction, treatment, and disposal of such pollution and wastes; that the assistance provided in this Chapter, especially with respect to financing, is therefore in the public interest and serves a public purpose of the State in

promoting the health, welfare and safety of the inhabitants of the State not only physically by collecting, reducing, treating and preventing environmental pollution but also economically by securing and retaining private industry thereby maintaining a higher level of employment and economic activity and stability.

(c) The General Assembly further finds that the federal government and its agencies have established, and may in the future establish, programs to promote gainful employment opportunity and the prevention and control of the pollution of air, land and waters of the United States through assistance in the financing of industrial and manufacturing facilities and pollution control facilities for industry and that the economical implementation of such programs in the State of North Carolina may require the financing of such facilities through a uniform statewide program.

(d) It is therefore declared to be the policy of the State to promote the right to gainful employment opportunity, private industry, the prevention and control of the pollution of the air, land and waters of the State, and the safety, morals and health of the people of the State, and thereby promote general welfare of the people of the State, by authorizing counties to create an authority which shall be a political subdivision and body corporate and politic of the State. This body is to be formed (i) to aid in the financing of industrial and manufacturing facilities for the purpose of alleviating unemployment or raising below average manufacturing wages by financing industrial and manufacturing facilities which provide job opportunities or pay better wages than those prevalent in the area and (ii) to aid in financing pollution control facilities for industry in connection with manufacturing and industrial facilities, in each case in connection with federal programs to effect such purposes; provided, however, that it is the policy of the State to finance only those facilities where there is a direct or indirect favorable impact on employment or an improvement in the degree of prevention or control of pollution commensurate with the size and cost of the facilities. (1977, 2nd Sess., c. 1198, s. 1.)

§ 159D-3. Definitions.—The following terms, whenever used or referred to in this Chapter, shall have the following respective meanings, unless a different meaning clearly appears from the context:

- (1) "Agency" shall include any agency, bureau, commission, department or instrumentality.
- (2) "Air pollution control facility" shall mean any structure, equipment or other facility for, including any increment in the cost of any structure, equipment or facility attributable to, the purpose of treating, neutralizing or reducing gaseous industrial waste and other air pollutants, including recovery, treatment, neutralizing or stabilizing plants and equipment and their appurtenances, which shall have been certified by the agency having jurisdiction to be in furtherance of the purpose of abating or controlling atmospheric pollutants or contaminants.
- (3) "Authority" shall mean The North Carolina Industrial and Pollution Control Facilities Financing Authority, a political subdivision and body politic of the State, which may be created pursuant to the provisions of this Chapter and which shall have the powers and authority specified in and by this Chapter.
- (4) "Bonds" shall mean revenue bonds of an authority issued under the provisions of this Chapter.
- (5) "Cost" as applied to any project shall embrace all capital costs thereof, including the cost of construction, the cost of acquisition of all property, including rights in land and other property, both real and personal and improved and unimproved, the cost of demolishing, removing or relocating any buildings or structures on lands so acquired, including

the cost of acquiring any lands to which such buildings or structures may be moved or relocated, the cost of all machinery and equipment, installation, start-up expenses, financing charges, interest prior to, during and for a period not exceeding one year after completion of construction, the cost of engineering and architectural surveys, plans and specifications, the cost of consultants' and legal services, other expenses necessary or incident to determining the feasibility or practicability of such project, administrative and other expenses necessary or incident to the acquisition or construction of such project and the financing of the acquisition and construction thereof, including a reserve for debt services.

- (6) "Federal program" shall mean a program of the federal government, or any agency thereof, under which payment of bonds or the obligations of an obligor under a financing agreement shall be guaranteed, in whole or in part, by a pledge of the full faith and credit of the United States of America.
- (7) "Financing agreement" shall mean a written instrument establishing the rights and responsibilities of the authority and the operator with respect to a project financed by the issue of bonds.
- (8) "Governing body" shall mean the board, commission, council or other body in which the general legislative powers of any county or other political subdivision are vested.
- (9) "Obligor" shall mean collectively the operator and any others (including, but not by way of limitation, the federal government or any agency thereof) who shall be obligated under a financing agreement or guaranty agreement or other contract or agreement to make payments to, or for the benefit of, the holders of bonds of the authority. Any requirement of an obligor may be satisfied by any one or more persons who are defined collectively by this Chapter as the obligor.
- (10) "Operator" shall mean the person entitled to the use or occupancy of a project.
- (11) "Political subdivision" shall mean any county, city, town, other unit of local government or any other governmental corporation, agency, authority or instrumentality of the State now or hereafter existing.
- (12) "Pollution and pollutants" shall mean any noxious or deleterious substances in any air or waters of or adjacent to the State of North Carolina or affecting the physical, chemical or biological properties of any air or waters of or adjacent to the State of North Carolina in a manner and to an extent which renders or is likely to render such air or waters harmful or inimical to the public health, safety or welfare, or to animal, bird or aquatic life, or to the use of such air or waters for domestic, industrial or agricultural purposes or recreation.
- (13) "Project" shall mean any land, equipment or any one or more buildings or other structures, whether or not on the same site or sites, and any rehabilitation, improvement, renovation or enlargement of, or any addition to, any building or structure for use as or in connection with (i) any industrial project for industry which project may be any industrial or manufacturing factory, mill, assembly plant or fabricating plant, or freight terminal, or industrial research, development or laboratory facility or industrial processing facility for industrial or manufactured products, or (ii) any pollution control project for industry which project may be any air pollution control facility, water pollution control facility, or solid waste disposal facility in connection with any factory, mill, plant, terminal or facility described in clause (i) of this subdivision, or (iii) any combination of projects mentioned in clauses (i) and (ii) of this subdivision. Any project may include all appurtenances

and incidental facilities such as land, headquarters or office facilities, warehouses, distribution centers, access roads, sidewalks, utilities, railway sidings, trucking and similar facilities, parking facilities, landing strips and other facilities for aircraft, waterways, docks, wharves and other improvements necessary or convenient for the construction, maintenance and operation of any building or structure, or addition thereto.

- (14) "Revenues" shall mean, with respect to any project, the rents, fees, charges, payments, proceeds and other income or profit derived therefrom or from the financing agreement or security document in connection therewith.
- (15) "Security document" shall mean a written instrument or instruments establishing the rights and responsibilities of the authority and the holders of bonds issued to finance a project, and may provide for, or be in the form of an agreement with, a trustee for the benefit of such bondholders. A security document may contain an assignment, pledge, mortgage or other encumbrance of all or part of the authority's interest in, or right to receive revenues with respect to, a project and any other property provided by the operator or other obligor under a financing agreement and may bear any appropriate title. A financing agreement and a security document may be combined as one instrument.
- (16) "Solid waste" shall mean solid waste materials resulting from any industrial or manufacturing activities or from any pollution control facility.
- (17) "Solid waste disposal facility" shall mean a facility for the purpose of treating, burning, compacting, composting, storing or disposing of solid waste.
- (18) "Water pollution control facility" shall mean any structure, equipment or other facility for, including any increment in the cost of any structure, equipment or facility attributable to, the purpose of treating, neutralizing or reducing liquid industrial waste and other water pollution, including collecting, treating, neutralizing, stabilizing, cooling, segregating, holding, recycling, or disposing of liquid industrial waste and other water pollution, including necessary collector, interceptor, and outfall lines and pumping stations, which shall have been certified by the agency exercising jurisdiction to be in furtherance of the purpose of abating or controlling water pollution. (1977, 2nd Sess., c. 1198, s. 1.)

§ 159D-4. Creation of the authority. — (a) The governing bodies of two or more counties are hereby authorized to create by resolution a political subdivision and body corporate and politic of the State known as "The North Carolina Industrial Facilities and Pollution Control Financing Authority," in order to effectuate in the most economical manner the acquisition, construction and financing of projects through federal programs.

If each governing body shall determine that it is in the best interest of the county to cause to be created and to become a member of the authority, each governing body shall adopt a resolution so finding and setting forth the names of the counties which are proposed to be initial members of the authority. The governing body of the county shall thereupon by ordinance or resolution appoint one commissioner of the authority.

Any two or more commissioners so named may file with the Secretary of State an application signed by them setting forth (i) the names of all the proposed member counties; (ii) the name and official residence of each of the commissioners so far as known to them; (iii) a certified copy of the appointment evidencing their right to office; (iv) a statement that each governing body of each respective county appointing a commissioner has made the aforesaid

determination; and (v) the desire that an authority be organized as a political subdivision and a body corporate and politic under this Chapter.

The application shall be subscribed and sworn to by such commissioners before an officer or officers authorized by the laws of the State to administer and certify oaths.

The Secretary of State shall examine the application and, if he finds that the name proposed for the authority is not identical with that of any other corporation of this State or of any agency or instrumentality thereof, or so nearly similar as to lead to confusion and uncertainty, he shall receive and file it and shall record it in an appropriate book of record in his office.

When the application has been made, filed and recorded as herein provided, the authority shall constitute a political subdivision and a body corporate and politic under the name proposed in the application. The Secretary of State shall make and issue to the commissioners executing the application a certificate of incorporation pursuant to this Chapter under the seal of the State, and shall record the same with the application. The certificate shall set forth the names of the member counties.

In any suit, action or proceeding involving the validity or enforcement of, or relating to, any contract of the authority, the authority, in the absence of establishing fraud in the premises, shall be conclusively deemed to have been established in accordance with the provisions of this Chapter upon proof of the issuance of the aforesaid certificate by the Secretary of State. A copy of such certificate, duly certified by the Secretary of State, shall be admissible in evidence in any such suit, action or proceeding, and shall be conclusive proof of the filing and contents thereof.

Notice of the issuance of such certificate shall be given to all of the proposed member counties by the Secretary of State. If a commissioner of any such county has not signed the application to the Secretary of State and such county does not notify the Secretary of State of the appointment of a commissioner within 40 days after receipt of such notice, such county shall be deemed to have elected not to be a member of the authority. As soon as practicable after the expiration of such 40-day period, the Secretary of State shall issue a new certificate of incorporation, if necessary, setting forth the names of those counties which have elected to become members of the authority. The failure of any proposed member to become a member shall not affect the validity of the corporate existence of the authority.

(b) After the creation of the authority, any county may become a member thereof upon application to the authority after adoption of a resolution or ordinance by the governing body of the county setting forth the determination and finding prescribed in paragraph (a) of this G.S. 159D-4, and authorizing said county to participate. Any county may withdraw from membership in the authority, provided, however, that all contractual rights acquired and obligations incurred while a county was a member shall remain in full force and effect.

(c) The authority shall consist of a board of commissioners appointed by the respective governing bodies of the counties which are members of the authority. Each commissioner shall have one vote. Each commissioner shall serve at the pleasure of the governing body by which he was appointed. Each appointed commissioner before entering upon his duties shall take and subscribe to an oath before some person authorized by law to administer oaths to execute the duties of his office faithfully and impartially, and a record of such oath shall be filed with the governing body of the appointing municipality and spread upon its minutes.

(d) The board of commissioners of the authority shall annually elect from its membership a chairman and a vice-chairman and another person or persons, who may but need not be commissioners, as treasurer, secretary and, if desired,

assistant secretary. The position of secretary and treasurer or assistant secretary and treasurer may be held by the same person. The secretary of the authority shall keep a record of the proceedings of the authority and shall be the custodian of all books, documents and papers filed with the authority, the minute book or journal of the authority and its official seal. Either the secretary or the assistant secretary of the authority may cause copies to be made of all minutes and other records and documents of the authority and may give certificates under the official seal of the authority to the effect that such copies are true copies, and all persons dealing with the authority may rely upon such certificates.

(e) A majority of the commissioners of the authority then in office shall constitute a quorum. Except as provided in subsection (f) of this G.S. 159D-4, the affirmative vote of a majority of all the commissioners of the authority shall be necessary for any action of the board. A vacancy in the board of commissioners of the authority shall not impair the right of a quorum to exercise all the rights and perform all the duties of the authority. Any action taken by the authority under the provisions of this Chapter may be authorized by resolution at any regular or special meeting, and each resolution shall take effect immediately and need not be published or posted. No bonds shall be issued under the provisions of this Chapter unless the issuance thereof shall have been approved by the governing body of the county in which the project with respect to which the bonds were issued is located.

(f) If at any time there shall be more than seven counties which are members of the authority, the board of commissioners of the authority may create an executive committee of the board of commissioners. The board may provide for the composition of the executive committee so as to afford, in its judgment, fair representation of the member counties. Any power of the authority under the provisions of this Chapter may be exercised by the executive committee of the authority between meetings of the authority, except that the executive committee may not overrule, reverse or disregard any action of the board of commissioners of the authority. The membership of the executive committee, terms of office of members thereof and the method of filling vacancies therein shall be fixed by the rules or bylaws of the board of commissioners.

(g) No commissioner of an authority shall receive any compensation for the performance of his duties under this Chapter; provided, however, that each commissioner shall be reimbursed for his necessary expenses incurred while engaged in the performance of duties but only from moneys provided by obligors.

(h) Within 30 days of the date of creation of the authority, the authority shall advise the Department of Commerce and the Local Government Commission that an authority has been formed. The authority shall also furnish such Department and such Commission with (i) a list of its commissioners and its officers and (ii) a description of any projects that are under consideration by the authority. The authority shall, from time to time, notify the Department of Commerce and the Local Government Commission of changes in the commissioners and officers, of counties which have become members of the authority and of new projects under consideration by the authority. (1977, 2nd Sess., c. 1198, s. 1.)

§ 159D-5. General powers. — The authority shall have all of the powers necessary or convenient to carry out and effectuate the purposes and provisions of this Chapter, including, but without limiting the generality of the foregoing, the powers:

- (1) To adopt bylaws for the regulation of its affairs and the conduct of its business and to prescribe rules, regulations and policies in connection with the performance of its functions and duties;
- (2) To adopt an official seal and alter the same at pleasure;

- (3) To maintain an office at such place or places as it may determine;
- (4) To sue and be sued in its own name, plead and be impleaded;
- (5) To receive, administer and comply with the conditions and requirements respecting any gift, grant or donation of any property or money;
- (6) To make and execute financing agreements, security documents and other contracts and instruments necessary or convenient in the exercise of the powers and functions of the authority under this Chapter;
- (7) To acquire by purchase, lease, gift or otherwise, but not by eminent domain, or to obtain options for the acquisition of any property, real or personal, improved or unimproved, and interests in land less than the fee thereof, for the construction, operation or maintenance of any project;
- (8) To sell, lease, exchange, transfer or otherwise dispose of, or to grant options for any such purposes with respect to, any real or personal property or interest therein;
- (9) To pledge or assign revenues of the authority;
- (10) To construct, acquire, own, repair, maintain, extend, improve, rehabilitate, renovate, furnish and equip one or more projects and to pay all or any part of the costs thereof from the proceeds of bonds of the authority or from any contribution, gift or donation or other funds made available to the authority for such purpose;
- (11) To fix, charge and collect revenues with respect to any project;
- (12) To employ consulting engineers, architects, attorneys, real estate counselors, appraisers and such other consultants and employees as may be required in the judgment of the authority and to fix and pay their compensation from funds available to the authority therefor; and
- (13) To do all acts and things necessary, convenient or desirable to carry out the purposes, and to exercise the powers herein granted. (1977, 2nd Sess., c. 1198, s. 1.)

§ 159D-6. Bonds. — The authority is hereby authorized to provide for the issuance, at one time or from time to time, of bonds of the authority for the purpose of paying all or any part of the cost of any project. The principal of, the interest on and any premium payable under the redemption of such bonds shall be payable solely from the funds herein authorized for such payment. The bonds of each issue shall bear interest as may be determined by the Local Government Commission of North Carolina with the approval of the authority and the obligor irrespective of the limitations of G.S. 24-1.1, as amended, and successor provisions. The bonds of each issue shall be dated, shall mature at such time or times not exceeding 30 years from the date of their issuance, and may be made redeemable before maturity at such price or prices and under such terms and conditions, as may be fixed by the authority prior to the issuance of the bonds. The authority shall determine the form and the manner of execution of the bonds, including any interest coupons to be attached thereto, and shall fix the denomination or denominations of the bonds and the place or places of payment of principal and interest. In case any officer whose signature or a facsimile of whose signature shall appear on any bonds or coupons shall cease to be such officer before the delivery of such bonds, such signature or such facsimile shall nevertheless be valid and sufficient for all purposes the same as if he had remained in office until such delivery. The authority may also provide for the authentication of the bonds by a trustee or fiscal agent. The bonds may be issued in coupon or in fully registered form, or both, as the authority may determine, and provision may be made for the registration of any coupon bonds as to principal alone and also as to both principal and interest, and for the reconversion into coupon bonds of any bonds registered as to both principal and interest, and for the interchange of registered and coupon bonds.

The proceeds of the bonds of each issue shall be used solely for the payment

of the cost of the project or projects, or a portion thereof, for which such bonds shall have been issued, and shall be disbursed in such manner and under such restrictions, if any, as the authority may provide in the financing agreement and the security document. If the proceeds of the bonds of any issue, by reason of increased construction costs or error in estimates or otherwise, shall be less than such cost, additional bonds may in like manner be issued to provide the amount of such deficiency. The authority may issue interim receipts or temporary bonds, with or without coupons, exchangeable for definitive bonds when such bonds have been executed and are available for delivery. The authority may also provide for the replacement of any bonds which shall become mutilated or shall be destroyed or lost.

Bonds may be issued under the provisions of this Chapter without obtaining, except as otherwise expressly provided in this Chapter, the consent of the State or of any political subdivision or of any agency of either thereof, and without any other proceedings or the happening of any conditions or things other than those proceedings, conditions or things which are specifically required by this Chapter and the provisions of the financing agreement and security document authorizing the issuance of such bonds and securing the same. (1977, 2nd Sess., c. 1198, s. 1.)

§ 159D-7. Approval of project. — No bonds may be issued by the authority unless the project for which the issuance thereof is proposed is first approved by the Secretary of the Department of Commerce. The authority shall file an application for approval of its proposed project with the Secretary of the Department of Commerce, and shall notify the Local Government Commission of such filing.

The Secretary shall not approve any proposed project unless he shall make all of the following, applicable findings:

- (1) In the case of a proposed industrial project,
 - a. That the operator of the proposed project pays, or has agreed to pay thereafter, an average weekly manufacturing wage (i) which is above the average weekly manufacturing wage paid in the county in which the project is to be located or (ii) which is not less than twenty percent (20%) above the average weekly manufacturing wage paid in the State; and
 - b. That the proposed project will not have a materially adverse effect on the environment;
- (2) In the case of a proposed pollution control project, that such project will have a materially favorable impact on the environment or will prevent or diminish materially the impact of pollution which would otherwise occur; and
- (3) In any case (whether the proposed project is an industrial or a pollution control project),
 - a. That the jobs to be generated or saved, directly or indirectly, by the proposed project will be large enough in number to have a measurable impact on the area immediately surrounding the proposed project and will be commensurate with the size and cost of the proposed project,
 - b. That the proposed operator of the proposed project has demonstrated or can demonstrate the capability to operate such project, and
 - c. That the financing of such project by the authority will not cause or result in the abandonment of an existing industrial or manufacturing facility of the proposed operator or an affiliate elsewhere within the State unless the facility is to be abandoned because of obsolescence, lack of available labor in the area, or site limitations.

In no case shall the Secretary of the Department of Commerce make the findings required by subdivisions (1)(b) and (2) of this section unless he shall have first received a certification from the Department of Natural Resources and Community Development that, in the case of a proposed industrial project, the proposed project will not have a materially adverse effect on the environment and that, in the case of a proposed pollution control project, the proposed project will have a materially favorable impact on the environment or will prevent or diminish materially the impact of pollution which would otherwise occur. In any case where the Secretary shall make all of the required findings respecting a proposed industrial project, except that prescribed in subdivision (1)(a) of this section, the Secretary may, in his discretion, approve the proposed project if he shall have received (i) a resolution of the governing body of the county in which the proposed project is to be located requesting that the proposed project be approved notwithstanding that the operator will not pay an average weekly manufacturing wage above the average weekly manufacturing wage in the county and (ii) a letter from an appropriate State official, selected by the Secretary, to the effect that unemployment in the county is especially severe.

To facilitate his review of each proposed project, the Secretary may require the authority to obtain and submit such data and information about such project as the Secretary may prescribe. In addition, the Secretary may, in his discretion, request the authority to hold a public hearing on the proposed project for the purpose of providing the Secretary directly with the views of the community to be affected. The Secretary may also prescribe such forms and such rules and regulations as he shall deem reasonably necessary to implement the provisions of this section.

If the Secretary approves the proposed project, he shall prepare a certificate of approval evidencing such approval and setting forth his findings and shall cause said certificate of approval to be published in a newspaper of general circulation within the county in which the proposed project is to be located. Any such approval shall be reviewable as provided in Article 4 of Chapter 150A of the General Statutes of North Carolina only by an action filed, within 30 days after notice of such findings and approval shall have been so published, in the Superior Court of Wake County. Such Superior Court is hereby vested with jurisdiction to hear such action, but if no such action is filed within the 30 days herein prescribed, the validity of such approval shall be conclusively presumed, and no court shall have authority to inquire into such approval. Copies of the certificate of approval of the proposed project will be given to the authority, the governing body of the county in which the proposed project is to be located and the Secretary of the Local Government Commission.

Such certificate of approval shall become effective immediately following the expiration of such 30-day period or the expiration of any appeal period after a final determination by any court of any action timely filed pursuant to this section. Such certificate shall expire one year after its date unless extended by the secretary who shall not extend such certificate unless he shall again approve the proposed project as provided in this section. (1977, 2nd Sess., c. 1198, s. 1.)

§ 159D-8. Approval of bonds. — No bonds may be issued by the authority unless the issuance thereof is first approved by the Local Government Commission.

The authority shall file an application for approval of its proposed bond issue with the Secretary of the Local Government Commission, and shall notify the Secretary of the Department of Commerce of such filing.

In determining whether a proposed bond issue should be approved, the Local Government Commission may consider, without limitation, the following:

- (1) Whether the proposed operator and obligor have demonstrated or can demonstrate the financial responsibility and capability to fulfill their obligations with respect to the financing agreement. In making such

determination, the commission may consider the operator's experience and the obligor's ratio of current assets to current liabilities, net worth, earnings trends and coverage of fixed charges, the nature of the industry or business involved and its stability and any additional security such as insurance, guaranties or property to be pledged or secure such bonds.

- (2) Whether the political subdivisions in or near which the proposed project is to be located have the ability to cope satisfactorily with the impact of such project and to provide, or cause to be provided, the public facilities and services, including utilities, that will be necessary for such project and on account of any increase in population which are expected to result therefrom.
- (3) Whether the proposed date and manner of sale will have an adverse effect upon any scheduled or anticipated sale of obligations by the State or any political subdivision or any agency of either of them.

To facilitate the review of the proposed bond issue by the commission, the secretary may require the authority to obtain and submit such financial data and information about the proposed bond issue and the security therefor, including the proposed prospectus or offering circular, the proposed financing agreement and security document and annual and other financial reports and statements of the obligor, as the secretary may prescribe. The secretary may also prescribe such forms and such rules and regulations as he shall deem reasonably necessary to implement the provisions of this section. (1977, 2nd Sess., c. 1198, s. 1.)

§ 159D-9. Sale of bonds. — Bonds may be sold in such manner, either at public or private sale, and for such price as the Local Government Commission shall determine to be for the best interests of the authority and effectuate best the purposes of this Chapter irrespective of the interest limitations set forth in G.S. 24-1.1, as amended, and successor provisions provided that such sale shall be approved by the authority and the obligor. (1977, 2nd Sess., c. 1198, s. 1.)

§ 159D-10. Location of projects. — Any project of the authority shall be located within the boundaries of a county which is a member of the authority. (1977, 2nd Sess., c. 1198, s. 1.)

§ 159D-11. Financing agreements. — Every financing agreement shall provide that:

- (1) The authority shall not operate the project;
- (2) The amounts payable under the financing agreement shall be sufficient to pay all of the principal of and interest and redemption premium, if any, on the bonds that shall be issued by the authority to pay the cost of the project as the same shall respectively become due;
- (3) The obligor shall pay all costs incurred by the authority in connection with the financing and administration of the project, except as may be paid out of the proceeds of bonds or otherwise, including, but without limitation, insurance costs, the cost of administering the financing agreement and the security document and the fees and expenses of the fiscal agent or trustee, paying agents, attorneys, consultants and others;
- (4) The obligor shall pay all the costs and expenses of operation, maintenance and upkeep of the project; and
- (5) The obligor's obligation to provide for the payment of the bonds in full shall not be subject to cancellation, termination or abatement until such payment of the bonds or provision therefor shall be made.

The financing agreement may be in the nature of:

- (1) A sale and leaseback,
- (2) A lease purchase,

- (3) A conditional sale,
- (4) An installment sale,
- (5) A secured or unsecured loan,
- (6) A loan and mortgage, or
- (7) Other similar transaction.

The financing agreement shall either provide that the obligor shall have an option to purchase, or require that the obligor purchase, the project upon the expiration or termination of the financing agreement subject to the condition that payment in full of the principal of, and the interest and any redemption premium on, the bonds, or provision therefor, shall have been made.

The financing agreement may provide the authority with rights and remedies in the event of a default by the obligor thereunder including, without limitation, any one or more of the following:

- (1) Acceleration of all amounts payable under the financing agreement;
- (2) Reentry and repossession of the project;
- (3) Termination of the financing agreement;
- (4) Leasing or sale of the project to others; and
- (5) Taking whatever actions at law or in equity may appear necessary or desirable to collect the amounts payable under, and to enforce covenants made in, the financing agreement.

The authority may assign all or any of its rights and remedies under the financing agreement to the trustee or bondholders under the security document.

Any such financing agreement may contain such additional provisions as in the determination of the authority are necessary or convenient to the effectuate the purposes of this Chapter. (1977, 2nd Sess., c. 1198, s. 1.)

§ 159D-12. Security documents. — Bonds issued under the provisions of this Chapter may be secured by a security document which may be a trust instrument between the authority and a bank or trust company or individual within the State, or a bank or a trust company without the State, as trustee. Such security document may pledge and assign the revenues provided for the security of the bonds, including proceeds from the sale of any project, or part thereof, insurance proceeds and condemnation awards, and may convey or mortgage the project and other property to secure a bond issue.

The revenues and other funds derived from the project, except such part thereof as may be necessary to provide reserves therefor, if any, shall be set aside at such regular intervals as may be provided in such security document in a sinking fund which may be thereby pledged to, and charged with, the payment of the principal of and the interest on such bonds as the same shall become due and the redemption price or the purchase price of bonds retired by call or purchase as therein provided. Such pledge shall be valid and binding from the time when the pledge is made. The revenues so pledged and thereafter received by the authority shall immediately be subject to the lien of such pledge without any physical delivery thereof or further act, and the lien of any such pledge shall be valid and binding as against all parties having claims of any kind in tort, contract or otherwise against the authority, irrespective of whether such parties have notice thereof. The use and disposition of money to the credit of such sinking fund shall be subject to the provisions of the security document. Such security document may contain such provisions for protecting and enforcing the rights and remedies of the bondholders as may be reasonable and proper and not in violation of law, including, without limitation, any one or more of the following:

- (1) Acceleration of all amounts payable under the security document;
- (2) Appointment of a receiver to manage the project and any other property mortgaged or assigned as security for the bonds;
- (3) Foreclosure and sale of the project and any other property mortgaged or assigned as security for the bonds; and

- (4) Rights to bring and maintain such other actions at law or in equity as may appear necessary or desirable to collect the amounts payable under, or to enforce the covenants made in, the security document.

It shall be lawful for any bank or trust company incorporated under the laws of this State which may act as depository of the proceeds of bonds, revenues or other funds provided under this Chapter to furnish such indemnifying bonds or to pledge such securities as may be required by the authority. All expenses incurred in carrying out the provisions of such security document may be treated as a part of the cost of the project in connection with which bonds are issued or as an expense of administration of such project.

The authority may subordinate the bonds or its rights under the financing agreement or otherwise to any prior, contemporaneous or future securities or obligations or lien, mortgage or other security interest.

Any such security document may contain such additional provisions as in the determination of the authority are necessary or convenient or effectuate the purposes of this Chapter. (1977, 2nd Sess., c. 1198, s. 1.)

§ 159D-13. Trust funds. — Notwithstanding any other provisions of law to the contrary, all money received pursuant to the authority of this Chapter, whether as proceeds from the sale of bonds or as revenues, shall be deemed to be trust funds to be held and applied solely as provided in this Chapter. The security document may provide that any of such moneys may be temporarily invested and reinvested pending the disbursement thereof in such securities and other investments as shall be provided in such security document, and shall provide that any officer with whom, or any bank or trust company with which, such moneys shall be deposited shall act as trustee of such moneys and shall hold and apply the same for the purpose hereof, subject to such regulations as this Chapter and such security document may provide. (1977, 2nd Sess., c. 1198, s. 1.)

§ 159D-14. Tax exemption. — The authority shall not be required to pay any taxes on any project or on any other property owned by the authority under the provisions of this Chapter or upon the income therefrom.

The interest on bonds issued by the authority shall be exempt from all income taxes within the State.

All projects and all transactions therefor shall be subject to taxation to the extent such projects and transactions would be subject to taxation if no public body were involved therewith. (1977, 2nd Sess., c. 1198, s. 1.)

§ 159D-15. Construction contracts. — The authority may agree with the prospective operator that all contracts relating to the acquisition, construction, installation and equipping of a project shall be solicited, negotiated, awarded and executed by the prospective operator and its agents subject only to such approval by the authority as the authority may require in such agreement. Such agreement may provide that the authority may, out of the proceeds of bonds, make advances to or reimburse the operator for all or a portion of its costs incurred in connection with such contracts. (1977, 2nd Sess., c. 1198, s. 1.)

§ 159D-16. Conflict of interest. — If any officer, commissioner or employee of the authority shall be interested either directly or indirectly in any contract with the authority, such interest shall be disclosed to the authority and shall be set forth in the minutes of the authority, and the officer, commissioner, employee or member having such interest therein shall not participate on behalf of the authority in the authorization of any such contract; provided, however, that this section shall not apply to the ownership of less than one per centum (1%) of the stock of any operator or obligor. Failure to take any or all actions necessary to carry out the purposes of this section shall not affect the validity of bonds issued pursuant to the provisions of this Chapter. (1977, 2nd Sess., c. 1198, s. 1.)

§ 159D-17. Credit of State not pledged. — Bonds issued under the provisions of this Chapter shall not be deemed to constitute a debt of the State or any political subdivision or any agency thereof or a pledge of the faith and credit of the State or any political subdivision or any such agency, but shall be payable solely from the revenues and other funds provided therefor. Each bond issued under this Chapter shall contain on the face thereof a statement to the effect that the authority shall not be obligated to pay the same or the interest thereon except from the revenues and other funds pledged therefor and that neither the faith and credit nor the taxing power of the State or any political subdivision or any agency thereof is pledged to the payment of the principal of or the interest on such bonds. (1977, 2nd Sess., c. 1198, s. 1.)

§ 159D-18. Bonds eligible for investment. — Bonds issued by an authority under the provisions of this Chapter are hereby made securities in which all public officers and agencies of the State and all political subdivisions, all insurance companies, trust companies, banking associations, investment companies, executors, administrators, trustees and other fiduciaries may properly and legally invest funds, including capital in their control or belonging to them. (1977, 2nd Sess., c. 1198, s. 1.)

§ 159D-19. Revenue refunding bonds. — (a) The authority is hereby authorized to provide by resolution for the issuance of refunding bonds of the authority for the purpose of refunding any bonds then outstanding which shall have been issued under the provisions of this Chapter, including the payment of any redemption premium thereon and any interest accrued or to accrue to the date of redemption of such bonds, and, if deemed advisable by the authority, for either or both of the following additional purposes:

(1) Constructing improvements, additions, extensions or enlargements of the project or projects in connection with which the bonds to be refunded shall have been issued; and

(2) Paying all or any part of the cost of any additional project or projects.

The issuance of such bonds, the maturities and other details thereof, the rights of the holders thereof, and the rights, duties and obligations of the authority in respect to the same shall be governed by the provisions of this Chapter which relate to the issuance of bonds, insofar as such provisions may be appropriate therefor.

The approvals required by G.S. 159D-7 and G.S. 159D-8 shall be obtained prior to the issuance of any refunding bonds; provided, however, that in the case where the refunding bonds of all or a portion of an issue are to be issued solely for the purpose of refunding outstanding bonds issued under this Chapter, the approval required by G.S. 159D-7 shall not be required as to the project financed with the bonds to be refunded.

(b) Refunding bonds issued under this section may be sold or exchanged for outstanding bonds issued under this Chapter and, if sold, the proceeds thereof may be applied, in addition to any other authorized purposes, to the purchase, redemption or payment of such outstanding bonds. Refunding bonds may be issued, in the determination of the authority, at any time not more than five years prior to the date of maturity or maturities or the date selected for the redemption of the bonds being refunded thereby. Pending the application of the proceeds of such refunding bonds, with any other available funds, to the payment of the principal of and accrued interest and any redemption premium on the bonds being refunded, and, if so provided or permitted in the security document securing the same, to the payment of any interest on such refunding bonds, such proceeds may be invested in direct obligations of, or obligations the principal of and the interest on which are unconditionally guaranteed by, the United States of America which shall mature or which shall be subject to

redemption by the holder thereof, at the option of such holder, not later than the respective dates when the proceeds, together with the interest accruing thereon will be required for the purposes intended. (1977, 2nd Sess., c. 1198, s. 1.)

§ 159D-20. No power of eminent domain. — The authority shall not have any right or power to acquire any property through the exercise of eminent domain or any proceedings in the nature of eminent domain. (1977, 2nd Sess., c. 1198, s. 1.)

§ 159D-21. Dissolution of the authority. — Whenever the board of commissioners of the authority and the governing bodies of two-thirds of the counties which are then members of the authority shall by joint resolution determine that the purposes for which the authority was formed have been substantially fulfilled and that all bonds theretofore issued and all other obligations theretofore incurred by the authority have been fully paid or satisfied, such board of commissioners and governing bodies may declare the authority to be dissolved. On the effective date of such joint resolution, the title to all funds and other property owned by the authority at the time of such dissolution shall vest as provided in said joint resolution, and possession of such funds and other property shall forthwith be delivered as provided in said joint resolution. (1977, 2nd Sess., c. 1198, s. 1.)

§ 159D-22. Annual reports; application of Article 3, Subchapter III of Chapter 159. — The authority shall, promptly following the close of each calendar year, submit an annual report of its activities for the preceding year to the governing bodies of the counties which are then members of the authority. Each such report shall set forth a complete operating and financial statement covering the operations of the authority during such year.

The provisions of Article 3, Subchapter III of Chapter 159 of the General Statutes of North Carolina entitled "The Local Government Budget and Fiscal Control Act" shall have no application to the authority. (1977, 2nd Sess., c. 1198, s. 1.)

§ 159D-23. Application of Article 9 of Chapter 25. — The provisions of G.S. 25-9-104(e) and G.S. 25-9-302(6) to the contrary notwithstanding, the provisions of Article 9 of North Carolina Uniform Commercial Code, being G.S. 25-9-101 to G.S. 25-9-607, inclusive, shall apply transactions under this Chapter 159D to the same extent the provisions of such Article 9 would apply were G.S. 25-9-104(e) and G.S. 25-9-302(b) hereby repealed. (1977, 2nd Sess., c. 1198, s. 1.)

§ 159D-24. Officers not liable. — No commissioner of any authority shall be subject to any personal liability or accountability by reason of his execution of any bonds or the issuance thereof. (1977, 2nd Sess., c. 1198, s. 1.)

§ 159D-25. Additional method. — The foregoing sections of this Chapter shall be deemed to provide an additional and alternative method for the doing of the things authorized thereby and shall be regarded as supplemental and additional to powers conferred by other laws, and shall not be regarded as in derogation of any powers now existing; provided, however, that the issuance of bonds or refunding bonds under the provisions of this Chapter need not comply with the requirements of any other law applicable to the issuance of bonds. (1977, 2nd Sess., c. 1198, s. 1.)

§ 159D-26. Liberal construction. — This Chapter, being necessary for the prosperity and welfare of the State and its inhabitants, shall be liberally construed to effect the purposes hereof. (1977, 2nd Sess., c. 1198, s. 1.)

§ 159D-27. Inconsistent laws inapplicable. — Insofar as the provisions of this Chapter are inconsistent with the provisions of any general, special or local laws, or parts thereof, the provisions of this Chapter shall be controlling. (1977, 2nd Sess., c. 1198, s. 1.)

Editor's Note: — For article, "Repealing Obsolete Through In Waste Forest Law," (1978)

Editor's Note: — The power to declare and amend ordinances

§ 160A-17. General ordinance-making power.

ARTICLE 2. Powers and Duties of the General Board of Health.

Section 160A-17. Regular and special meetings.

(a) The mayor, the mayor pro tempore or any two members of the council may at any time call a special meeting by signing a written notice stating the time and place of the meeting and the subjects to be considered. The notice shall be delivered to the mayor and each councilman or to his usual dwelling place at least six hours before the meeting. Special meetings may be held at any time when the mayor and all members of the council are present and consent thereto, or when those not present have signed a written waiver of notice. Only those items of business specified in the notice may be transacted at a special meeting, unless all members are present or have signed a written waiver of notice. In addition to the provisions set out in this subsection or any city charter, a person or persons calling a special meeting of a city council shall comply with the notice requirements of Article 2B of General Statutes Chapter 123B.

(b) The mayor, the mayor pro tempore or any two members of the council may at any time call a special meeting by signing a written notice stating the time and place of the meeting and the subjects to be considered. The notice shall be delivered to the mayor and each councilman or to his usual dwelling place at least six hours before the meeting. Special meetings may be held at any time when the mayor and all members of the council are present and consent thereto, or when those not present have signed a written waiver of notice. Only those items of business specified in the notice may be transacted at a special meeting, unless all members are present or have signed a written waiver of notice. In addition to the provisions set out in this subsection or any city charter, a person or persons calling a special meeting of a city council shall comply with the notice requirements of Article 2B of General Statutes Chapter 123B.

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(b) The mayor, the mayor pro tempore or any two members of the council may at any time call a special meeting by signing a written notice stating the time and place of the meeting and the subjects to be considered. The notice shall be delivered to the mayor and each councilman or to his usual dwelling place at least six hours before the meeting. Special meetings may be held at any time when the mayor and all members of the council are present and consent thereto, or when those not present have signed a written waiver of notice. Only those items of business specified in the notice may be transacted at a special meeting, unless all members are present or have signed a written waiver of notice. In addition to the provisions set out in this subsection or any city charter, a person or persons calling a special meeting of a city council shall comply with the notice requirements of Article 2B of General Statutes Chapter 123B.

Chapter 160A. Cities and Towns.

Article 5. Form of Government.

Part 3. Organization and Procedures of the Council.

Sec.

160A-71. Regular and special meetings;
procedure.

Article 22.

Urban Redevelopment Law.

Sec.

160A-511. Interest of members or employees.

ARTICLE 4.

Corporate Limits.

Part 1. General Provisions.

§ 160A-21. Existing boundaries.

Quoted in *Jones v. Jeanette*, 34 N.C. App. 526,
239 S.E.2d 293 (1977).

ARTICLE 5.

Form of Government.

Part 3. Organization and Procedures of the Council.

§ 160A-71. Regular and special meetings; procedure.

(b) The mayor, the mayor pro tempore, or any two members of the council may at any time call a special council meeting by signing a written notice stating the time and place of the meeting and the subjects to be considered. The notice shall be delivered to the mayor and each councilman or left at his usual dwelling place at least six hours before the meeting. Special meetings may be held at any time when the mayor and all members of the council are present and consent thereto, or when those not present have signed a written waiver of notice. Only those items of business specified in the notice may be transacted at a special meeting, unless all members are present or have signed a written waiver of notice. In addition to the procedures set out in this subsection or any city charter, a person or persons calling a special meeting of a city council shall comply with the notice requirements of Article 33B of General Statutes Chapter 143. (1977, 2nd Sess., c. 1191, s. 7.)

Editor's Note. — The 1977, 2nd Sess., amendment, effective October 1, 1978, added the last sentence of subsection (b).

As subsections (a) and (c) were not changed by the amendment, they are not set out.

ARTICLE 8.

Delegation and Exercise of the General Police Power.

§ 160A-174. General ordinance-making power.

Editor's Note. —

For article, "Regulating Obscenity Through

the Power to Define and Abate Nuisances," see 14 Wake Forest L. Rev. 1 (1978).

ARTICLE 11.

*Eminent Domain.***§ 160A-241. Power of eminent domain conferred.****Editor's Note. —**

For note discussing constitutional challenges to Laws 1967, ch. 506 and "quick take" condemnation proceedings, see 8 N.C. Central

L.J. 289 (1977).

Stated in *Orange Water & Sewer Auth. v. Estate of Armstrong*, 34 N.C. App. 162, 237 S.E.2d 486 (1977).

§ 160A-263. Right of entry prior to condemnation.

Quoted in *Orange Water & Sewer Auth. v. Estate of Armstrong*, 34 N.C. App. 162, 237 S.E.2d 486 (1977).

ARTICLE 15.

*Streets, Traffic and Parking.***§ 160A-304. Regulation of taxis.**

Subsection (a)(2) does not prohibit the issuance of taxi operator's permits where the applicant therefor has a prior conviction for possession or sale of intoxicating liquors.

Opinion of Attorney General to Mr. Joe Chandler, City Attorney, Elizabethtown, N.C., 47 N.C.A.G. 74 (1977).

ARTICLE 16.

Public Enterprises.

Part 1. General Provisions.

§ 160A-311. Public enterprise defined.

Cited in *Big Bear of North Carolina, Inc. v. City of High Point*, 294 N.C. 262, 240 S.E.2d 422 (1978).

§ 160A-312. Authority to operate public enterprises.

Power But Not Obligation to Provide Garbage Service. — A municipality may provide the service of collecting and removing garbage as an exercise of police powers delegated to it, but a municipality is under no compulsion to provide such service. *Big Bear of North Carolina, Inc. v. City of High Point*, 294 N.C. 262, 240 S.E.2d 422 (1978).

Rates Charged for Garbage Service. — A municipality which does provide garbage collection services may impose a charge reasonably commensurate with the cost of this

service upon the householder or building occupant. Under proper classification, the rates charged need not be uniform and a business may be charged at a rate different from individuals. *Big Bear of North Carolina, Inc. v. City of High Point*, 294 N.C. 262, 240 S.E.2d 422 (1978).

Municipality need not provide garbage collection services to one who refuses to pay the charge imposed and may discontinue this service in the event of nonpayment. *Big Bear of North Carolina, Inc. v. City of High Point*, 294 N.C. 262, 240 S.E.2d 422 (1978).

§ 160A-314. Authority to fix and enforce rates.

Right to Classify Consumers under Reasonable Classifications. — The statutory authority of a city to fix and enforce rates for its services and to classify its customers is not a license to discriminate among customers of essentially the same character and services. Rather, this section must be read as a codification of the general rule that a city has the

right to classify consumers under reasonable classifications based upon such factors as the cost of service or any other matter which presents a substantial difference as a ground of distinction. *Town of Taylorsville v. Modern Cleaners*, 34 N.C. App. 146, 237 S.E.2d 484 (1977).

ARTICLE 19.

Planning and Regulation of Development.

Part 1. General Provisions.

§ 160A-360. Territorial jurisdiction.

The obvious purpose of the statutory mandate in subsection (b) requiring that boundaries be defined in terms of geographical features identifiable on the ground is that boundaries be defined, to the extent feasible, so that owners of property outside the city can easily and accurately ascertain whether their property is within the area over which the city exercises its extraterritorial zoning authority. *Sellers v. City of Asheville*, 33 N.C. App. 544, 236 S.E.2d 283

(1977).

Definiteness in Boundary Descriptions Not Met. — The boundaries of a city's proposed extraterritorial zone failed to meet the degree of definiteness mandated by subsection (b) where the only description merely referred to "the territory beyond the corporate limits for a distance of one mile in all directions," and the map showed the "mile boundary" drawn in sweeping curves. *Sellers v. City of Asheville*, 33 N.C. App. 544, 236 S.E.2d 283 (1977).

§ 160A-364. Procedure for adopting or amending ordinances under Article.

Notice Must Reveal Nature and Character of Proposed Action. — To be adequate, the notice of public hearing required by this section must fairly and sufficiently apprise those whose rights may be affected of the nature and character of the action proposed. *Sellers v. City of Asheville*, 33 N.C. App. 544, 236 S.E.2d 283 (1977).

Where none of the notices published pursuant

to this section informed the public that the city intended, for the first time in its history, to make its zoning ordinance applicable to property outside its city limits, the notices were not in compliance with this section since they failed adequately to alert owners of property outside the city that their rights might be affected. *Sellers v. City of Asheville*, 33 N.C. App. 544, 236 S.E.2d 283 (1977).

Part 2. Subdivision Regulation.

§ 160A-371. Subdivision regulation.

Editor's Note. — For comment, "Urban Planning And Land Use Regulation: The Need

For Consistency," see 14 Wake Forest L. Rev. 81 (1978).

Part 3. Zoning.

§ 160A-381. Grant of power.

Editor's Note. —

For survey of 1972 case law on spot and contract zoning, see 51 N.C.L. Rev. 1132 (1973).

For comment, "Planned Unit Development and North Carolina Enabling Legislation," see 51 N.C.L. Rev. 1455 (1973).

For article discussing North Carolina special exception and zoning amendment cases, see 53 N.C.L. Rev. 925 (1975).

For comment, "Urban Planning And Land Use Regulation: The Need For Consistency," see 14 Wake Forest L. Rev. 81 (1978).

Power Has Been Delegated to Cities, etc. —

A city has power to zone only as delegated to it by enabling statutes. *Sellers v. City of Asheville*, 33 N.C. App. 544, 236 S.E.2d 283 (1977).

But Power Is Subject, etc. —

In accord with 7th paragraph in original. See *Sellers v. City of Asheville*, 33 N.C. App. 544, 236 S.E.2d 283 (1977).

§ 160A-382. Districts.

Editor's Note. — For comment, "Planned Unit Development and North Carolina Enabling Legislation," see 51 N.C.L. Rev. 1455 (1973).

§ 160A-383. Purposes in view.

Editor's Note. — For comment, "Planned Unit Development and North Carolina Enabling Legislation," see 51 N.C.L. Rev. 1455 (1973).

§ 160A-384. Method of procedure.

Editor's Note. — For comment, "Planned Unit Development and North Carolina Enabling Legislation," see 51 N.C.L. Rev. 1455 (1973).

§ 160A-385. Changes.**Editor's Note. —**

For comment, "Planned Unit Development and North Carolina Enabling Legislation," see 51 N.C.L. Rev. 1455 (1973).

For article discussing North Carolina special exception and zoning amendment cases, see 53 N.C.L. Rev. 925 (1975).

§ 160A-386. Protest petition; form; requirements; time for filing.

Editor's Note. — For comment, "Planned Unit Development and North Carolina Enabling Legislation," see 51 N.C.L. Rev. 1455 (1973).

§ 160A-387. Planning agency; zoning plan; certification to city council.**Editor's Note. —**

For comment, "Planned Unit Development

and North Carolina Enabling Legislation," see 51 N.C.L. Rev. 1455 (1973).

§ 160A-388. Board of adjustment.**Editor's Note. —**

For comment, "Planned Unit Development and North Carolina Enabling Legislation," see 51 N.C.L. Rev. 1455 (1973).

N.C.L. Rev. 925 (1975).

For article discussing North Carolina special exception and zoning amendment cases, see 53

Cited in *Washington Park Neighborhood Ass'n v. Winston-Salem Zoning Bd. of Adjustment*, 35 N.C. App. 449, 241 S.E.2d 872 (1978).

Part 4. Acquisition of Open Space.**§ 160A-401. Legislative intent.**

Editor's Note. — For comment, "Urban Planning And Land Use Regulation: The Need For Consistency," see 14 Wake Forest L. Rev. 81 (1978).

Part 5. Building Inspection.

§ 160A-411. Inspection department.

Editor's Note. — Regulation: The Need For Consistency," see 14 Wake Forest L. Rev. 81 (1978).
For comment, "Urban Planning And Land Use

Part 6. Minimum Housing Standards.

§ 160A-441. Exercise of police power authorized.

Editor's Note. — Regulation: The Need For Consistency," see 14 Wake Forest L. Rev. 81 (1978).
For comment, "Urban Planning And Land Use

Part 8. Community Development.

§ 160A-457. Acquisition and disposition of property for redevelopment.

Local Modification. — City of Wilson; 1977, 2nd Sess., c. 1196.

ARTICLE 22.

Urban Redevelopment Law.

§ 160A-511. Interest of members or employees. — No member or employee of a commission shall acquire any interest, direct or indirect, in any redevelopment project or in any property included or planned to be included in any redevelopment area, or in any area which he may have reason to believe may be certified to be a redevelopment area, nor shall he have any interest, direct or indirect, in any contract or proposed contract for materials or services to be furnished or used by a commission, or in any contract with a redeveloper or prospective redeveloper relating, directly or indirectly, to any redevelopment project, except that a member or employee of a commission may acquire property in a residential redevelopment area from a person or entity other than the commission after the residential redevelopment plan for that area is adopted if:

(1) The primary purpose of acquisition is to occupy the property as his principal residence;

(2) The redevelopment plan does not provide for acquisition of such property by the commission; and

(3) Prior to acquiring title to the property, the member or employee shall have disclosed in writing to the commission and to the local governing body his intent to acquire the property and to occupy the property as his principal residence.

Except as authorized herein, the acquisition of any such interest in a redevelopment project or in any such property or contract shall constitute misconduct in office. If any member or employee of a commission shall have already owned or controlled within the preceding two years any interest, direct or indirect, in any property later included or planned to be included in any redevelopment project, under the jurisdiction of the commission, or has any such interest in any contract for material or services to be furnished or used in connection with any redevelopment project, he shall disclose the same in writing to the commission and to the local governing body. Any disclosure required herein shall be entered in writing upon the minute books of the commission.

Failure to make disclosure shall constitute misconduct in office. (1951, c. 1095, s. 8; 1973, c. 426, s. 75; 1977, 2nd Sess., c. 1139.)

Editor's Note. — The 1977, 2nd Sess., amendment divided this section into paragraphs, added at the end of the introductory language in the first paragraph the language beginning "except that a member or employee" and ending "adopted if:," added subdivisions (1), (2) and (3) to the first paragraph, added "Except as authorized herein" at the beginning of the first

sentence of the second paragraph, and divided the former third sentence of the section into the present second and third sentences of the second paragraph, substituting "Any disclosure required herein" for "and such disclosure" at the beginning of the present third sentence of the second paragraph.

Chapter 161.**Register of Deeds.****Article 1.****The Office.**

Sec.

161-10. Uniform fees of registers of deeds.

ARTICLE 1.*The Office.*

§ 161-10. Uniform fees of registers of deeds. — (a) In the performance of his duties, the register of deeds shall collect the following fees which shall be uniform throughout the State:

(1) Instruments in General. — For registering or filing any instrument for which no other provision is made by this section, whether written, printed, or typewritten, the fee shall be three dollars (\$3.00) for the first page, which page shall not exceed eight and one-half inches by 14 inches, plus one dollar (\$1.00) for each additional page or fraction thereof. A page exceeding eight and one-half inches by 14 inches shall be considered two pages.

(2) Marriage Licenses. — For issuing a license — ten dollars (\$10.00); for issuing a delayed certificate with one certified copy — five dollars (\$5.00); and for a proceeding for correction of names in application, license or certificate, with one certified copy — five dollars (\$5.00).

(3) Plats. — For each original or revised plat recorded — ten dollars (\$10.00); for furnishing a certified copy of a plat — two dollars (\$2.00).

(4) Right-of-Way Plans. — For each original or amended plan and profile sheet recorded — five dollars (\$5.00). This fee is to be collected from the Board of Transportation.

(5) Registration of Birth Certificate Four Years or More after Birth. — For preparation of necessary papers when birth to be registered in another county — two dollars and fifty cents (\$2.50); for registration when necessary papers prepared in another county, with one certified copy — two dollars and fifty cents (\$2.50); for preparation of necessary papers and registration in the same county, with one certified copy — five dollars (\$5.00).

(6) Amendment of Birth or Death Record. — For preparation of amendment and effecting correction — one dollar (\$1.00).

(7) Legitimations. — For preparation of all documents concerned with legitimations — five dollars (\$5.00).

(8) Certified Copies of Birth and Death Certificates and Marriage Licenses. — For furnishing a certified copy of a death or birth certificate or marriage license — two dollars (\$2.00).

(9) Certified Copies. — For furnishing a certified copy of any instrument for which no other provision is made by this section — one dollar (\$1.00) per page or fraction thereof.

(10) Comparing Copy for Certification. — For comparing and certifying a copy of any instrument filed for registration, when the copy is furnished by the party filing the instrument for registration and at the time of filing thereof — one dollar (\$1.00).

(11) Uncertified Copies. — When, as a convenience to the public, the register of deeds supplies uncertified copies of instruments, he may charge fees that in his discretion bear a reasonable relation to the quality of copies supplied and the cost of purchasing and maintaining copying equipment. These fees may be changed from time to time, but the amount of these fees shall at all times be prominently posted in his office.

(12) Acknowledgment. — For taking an acknowledgment, oath, or affirmation or for the performance of any notarial act — one dollar (\$1.00). This fee shall not be charged if the act is performed as a part of one of the services for which a fee is provided by this subsection; except that this fee shall be charged in addition to the fees for registering, filing or recording instruments or plats as provided by subdivisions (1) and (3) of this subsection.

(13) Uniform Commercial Code. — Such fees as are provided for in Chapter 25, Article 9, Part 4, of the General Statutes.

(14) Torrens Registration. — Such fees as are provided in G.S. 43-5.

(15) Master Forms. — Such fees as are provided for instruments in general.

(16) Probate. — For certification of instruments for registration as provided in G.S. 47-14 — one dollar (\$1.00).

(17) Qualification of Notary Public. — For administering the oaths of office to a notary public and making the appropriate record entries as provided in G.S. 10-2 — three dollars (\$3.00).

(18) Reinstatements of Articles of Incorporation. — For filing reinstatements of articles of incorporation prepared pursuant to G.S. 105-232 — two dollars (\$2.00). The fee shall be paid by the corporation affected.

(1977, 2nd Sess., c. 1132.)

Editor's Note. —

The 1977, 2nd Sess., amendment, effective July 1, 1978, increased the fees in subdivisions (1), (2), (3) and (16) of subsection (a).

As the rest of the section was not changed by the amendment, only subsection (a) is set out.

Chapter 162.

Sheriff.

Article 4.

County Prisoners.

Sec.

162-42. Counties and towns may hire out certain prisoners.

Sec.

162-46. Deductions from sentence allowed for good behavior.

ARTICLE 3.

Duties of Sheriff.

§ 162-14. Execute process; penalty for false return.

I. GENERAL CONSIDERATIONS.

Summary, etc. —

In accord with original. See *Rollins v. Gibson*, 293 N.C. 73, 235 S.E.2d 159 (1977).

II. NEGLIGENCE OR FAILURE TO MAKE DUE RETURN.

A. In General.

It is clear that the sheriff must be diligent in both the execution and return of process or suffer the \$100.00 penalty provided in this section. *Rollins v. Gibson*, 293 N.C. 73, 235 S.E.2d 159 (1977).

III. FALSE RETURN.

Power of Court to allow Return to Be Amended. —

A sheriff may move to amend his return of process so as to make it speak the truth even after suit has been brought for the penalty imposed for a false return and though the amendment defeats the plaintiff's right to recover such penalty. In such a case, the sheriff does not as a matter of law have the right to amend his return in order to correct his error, rather, it is within the discretion of the presiding judge to allow such amendments in meritorious cases. *Rollins v. Gibson*, 293 N.C. 73, 235 S.E.2d 159 (1977).

This section applies to process issued in criminal, as well as civil, proceedings, and *Harrell v. Warren*, 100 N.C. 259, 6 S.E. 777 (1888) and *Martin v. Martin*, 50 N.C. 349 (1858) are hereby overruled. *Rollins v. Gibson*, 293 N.C. 73, 235 S.E.2d 159 (1977).

Restricted to Civil Process. —

Holdings in notes under this catchline in both original and 1977 Supplement reversed in *Rollins v. Gibson*, 293 N.C. 73, 235 S.E.2d 159 (1977).

Element Essential to Liability. —

For the sheriff to incur the heavy \$500.00 penalty, the return must be false in point of fact, and not false merely as importing, from facts truly stated, a wrong legal conclusion. *Rollins v. Gibson*, 293 N.C. 73, 235 S.E.2d 159 (1977).

A return untrue in fact is a false return, etc. —

The importance of veracity of quasi-judicial records, led to adoption of the stringent rule that every untrue return, in fact, is a false return within the purview of this section. *Rollins v. Gibson*, 293 N.C. 73, 235 S.E.2d 159 (1977).

Mistake. —

In accord with 3rd paragraph in original. See *Rollins v. Gibson*, 293 N.C. 73, 235 S.E.2d 159 (1977).

Damage to Plaintiff Immaterial. — Under case law and this section, it is immaterial in a civil action for the \$500.00 penalty whether any damage was done to the plaintiff. *Rollins v. Gibson*, 293 N.C. 73, 235 S.E.2d 159 (1977).

The \$500.00 penalty is not intended to be a substitute for damages to an injured party because this section allows "the party aggrieved" to bring a separate action for damages. *Rollins v. Gibson*, 293 N.C. 73, 235 S.E.2d 159 (1977).

A false inference in a return will render the return false if the facts are omitted from the return. But where the facts underlying the inference or conclusion are truly stated in the return there can be no liability for a false return although the sheriff may still be exposed to a lesser liability for failing to execute the writ or for not making a proper and legal return. *Rollins v. Gibson*, 293 N.C. 73, 235 S.E.2d 159 (1977).

To subject one to the heavy penalty of the statute, the falseness must be stated as a fact and not merely by way of inference from facts. *Rollins v. Gibson*, 293 N.C. 73, 235 S.E.2d 159 (1977).

Illustrations. —

The conclusion found in a return that the defendant "after a due and diligent search is not to be found" without more, if untrue, may be the basis for a finding of a false return. *Rollins v. Gibson*, 293 N.C. 73, 235 S.E.2d 159 (1977).

A sheriff can be liable under this section for a return of criminal process which states only that a defendant "after due and diligent search is not to be found," when a jury finds, upon

sufficient competent evidence, that the return is false. *Rollins v. Gibson*, 293 N.C. 73, 235 S.E.2d 159 (1977).

ARTICLE 4.

County Prisoners.

§ 162-41: Repealed by Session Laws 1977, c. 711, s. 33, effective July 1, 1978.

Editor's Note. —

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without

regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

§ 162-42. **Counties and towns may hire out certain prisoners.** — The board of commissioners of the several counties, within their respective jurisdictions, or such other county authorities therein as may be established, and the mayor and intendant of the several cities and towns of the State, have power to provide under such rules and regulations as they may deem best for the employment on the public streets, public highways, public works, or other labor for individuals or corporations, of all persons imprisoned in the jails of their respective counties, cities and towns, upon conviction of any crime or misdemeanor, or who may be committed to jail for failure to enter into bond for keeping the peace or for good behavior, and who fail to pay all the costs which they are adjudged to pay, or to give good and sufficient security therefor: Provided, such prisoner or convict shall not be detained beyond the time fixed by the judgment of the court. The amount realized from hiring out such persons shall be credited to them for the fine and bill of costs in all cases of conviction. (1866-7, c. 30; 1872-3, c. 174, s. 10; 1874-5, c. 113; 1876-7, c. 196, s. 1; 1879, c. 218; Code, s. 3448; Rev., s. 1352; C. S., s. 1356; 1973, c. 822, s. 3; 1977, c. 711, s. 31.)

Editor's Note. — The 1977 amendment, effective July 1, 1978, deleted the former third sentence, which provided: "It is unlawful to farm out any such convicted person who may be imprisoned for the nonpayment of a fine, or as punishment imposed for the offense of which he may have been convicted, unless the court before whom the trial is had shall in its judgment so authorize."

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without

regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

Session Laws 1977, c. 711, s. 36, contains a severability clause.

Because of the postponed effective date of the 1977 amendment, this section as amended was not set out in the text in the 1977 Cumulative Supplement, but was carried in a note. The amended section is therefore set out in this 1978 Interim Supplement.

§ 162-45: Repealed by Session Laws 1977, c. 711, s. 33, effective July 1, 1978.

Editor's Note. —

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without

regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

§ 162-46. Deductions from sentence allowed for good behavior. — When a defendant has been sentenced to a facility other than one maintained by the Department of Correction, and has faithfully performed the duties assigned to him during his term of sentence, he is entitled to a deduction from the time of his sentence of five days for each month, and he shall be discharged when he has served his sentence, less the number of days he may be entitled to have deducted. The authorities having him in charge shall be the sole judges as to the faithful performance of the duties assigned to him. Should he escape or attempt to escape, he shall forfeit any deduction he may have been entitled to prior to that time. (1913, c. 167, s. 1; C. S., s. 1360; 1973, c. 822, s. 3; 1977, c. 711, s. 32.)

Editor's Note. — The 1977 amendment, effective July 1, 1978, rewrote this section.

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this

act regarding parole shall not apply to persons sentenced before July 1, 1978."

Session Laws 1977, c. 711, s. 36, contains a severability clause.

Because of the postponed effective date of the 1977 amendment, this section as amended was not set out in the text in the 1977 Cumulative Supplement, but was carried in a note. The amended section is therefore set out in this 1978 Interim Supplement.

§ 162-47: Repealed by Session Laws 1977, c. 711, s. 33, effective July 1, 1978.

Editor's Note. —

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without

regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

§ 162-49: Repealed by Session Laws 1977, c. 711, s. 33, effective July 1, 1978.

Editor's Note. —

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without

regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

Chapter 162A.

Water and Sewer Systems.

ARTICLE 1.

Water and Sewer Authorities.

§ 162A-6. Powers of authority generally.

The power of eminent domain under subdivision (10) is subject to the provisions of § 162A-7(a). *Orange Water & Sewer Auth. v. Estate of Armstrong*, 34 N.C. App. 162, 237 S.E.2d 486, cert. denied, 293 N.C. 593 (1977).

A water and sewer authority's right of eminent domain is not dormant before certification under § 162A-7. Because it has the power of eminent domain possessed by cities, it may enter and survey prior to the institution of an eminent domain proceeding. *Orange Water & Sewer Auth. v. Estate of Armstrong*, 34 N.C. App. 162, 237 S.E.2d 486, cert. denied, 293 N.C. 593 (1977).

The procedures for eminent domain governing cities and counties apply to water and sewer authorities created pursuant to this Article. *Orange Water & Sewer Auth. v. Estate*

of *Armstrong*, 34 N.C. App. 162, 237 S.E.2d 486, cert. denied, 293 N.C. 593 (1977).

With additional requirement that a certificate of authorization be obtained before an action in eminent domain is commenced. *Orange Water & Sewer Auth. v. Estate of Armstrong*, 34 N.C. App. 162, 237 S.E.2d 486, cert. denied, 293 N.C. 593 (1977).

Authority to Enter Land Prior to Institution of Eminent Domain Proceedings. — A water and sewer authority, having the power of eminent domain possessed by cities, may enter lands for the purpose of making surveys prior to the institution of eminent domain proceedings. *Orange Water & Sewer Auth. v. Estate of Armstrong*, 34 N.C. App. 162, 237 S.E.2d 486, cert. denied, 293 N.C. 593 (1977).

§ 162A-7. Prerequisites to acquisition of water, etc., by eminent domain.

The procedures for eminent domain governing cities and counties apply to water and sewer authorities created pursuant to this Article. *Orange Water & Sewer Auth. v. Estate of Armstrong*, 34 N.C. App. 162, 237 S.E.2d 486, cert. denied, 293 N.C. 593 (1977).

With additional requirement that a certificate of authorization be obtained before an action in eminent domain is commenced. *Orange Water & Sewer Auth. v. Estate of Armstrong*, 34 N.C. App. 162, 237 S.E.2d 486, cert. denied, 293 N.C. 593 (1977).

A water and sewer authority's right of eminent domain is not dormant before

certification under this section. Because it has the power of eminent domain possessed by cities, it may enter and survey prior to the institution of an eminent domain proceeding. *Orange Water & Sewer Auth. v. Estate of Armstrong*, 34 N.C. App. 162, 237 S.E.2d 486, cert. denied, 293 N.C. 593 (1977).

A water and sewer authority, having the power of eminent domain possessed by cities, may enter lands for the purpose of making surveys prior to the institution of eminent domain proceedings. *Orange Water & Sewer Auth. v. Estate of Armstrong*, 34 N.C. App. 162, 237 S.E.2d 486, cert. denied, 293 N.C. 593 (1977).

Chapter 163.**Elections and Election Laws.****SUBCHAPTER VIII. REGULATION OF
ELECTION CAMPAIGNS.****Article 22B.****Appropriations from the North
Carolina Election Campaign Fund.**

Sec.

163-278.41. Appropriations in general election
years and other years.

Sec.

163-278.42. Distribution of campaign funds;
legitimate expenses permitted.163-278.43. Report each year to State Board of
Elections; suspension of
disbursements; willful violations
a misdemeanor.

163-278.44. Crime; punishment.

163-278.45. Definitions.

SUBCHAPTER II. ELECTION OFFICERS.**ARTICLE 3.***State Board of Elections.***§ 163-22.1. Power of State Board to order new elections.**

Editor's Note. — For comment on election
contests in North Carolina, see 55 N.C.L. Rev.
1228 (1977).

SUBCHAPTER III. QUALIFYING TO VOTE.**ARTICLE 6.***Qualifications of Voters.***§ 163-55. Qualifications to vote; exclusion from electoral franchise.**

Editor's Note. —

For a note on the constitutionality of denying
voting rights to convicted criminals, see 50

N.C.L. Rev. 903 (1972).

For survey of 1972 case law on student
suffrage, see 51 N.C.L. Rev. 1060 (1973).

§ 163-57. Residence defined for registration and voting.

Editor's Note. — For survey of 1972 case law
on student suffrage, see 51 N.C.L. Rev. 1060
(1973).

ARTICLE 7.*Registration of Voters.***§ 163-77. Appeal from county board of elections to superior court.**

Editor's Note. — For comment on election
contests in North Carolina, see 55 N.C.L. Rev.
1228 (1977).

ARTICLE 8.

*Challenges.***§ 163-87. Challenges allowed on day of primary or election.**

Editor's Note. — For comment on election contests in North Carolina, see 55 N.C.L. Rev. 1228 (1977).

§ 163-88. Hearing on challenge made on day of primary or election.

Editor's Note. — For comment on election contests in North Carolina, see 55 N.C.L. Rev. 1228 (1977).

§ 163-89. Procedures for challenging absentee ballots.

Editor's Note. — For comment on election contests in North Carolina, see 55 N.C.L. Rev. 1228 (1977).

SUBCHAPTER VI. CONDUCT OF PRIMARIES AND ELECTIONS.

ARTICLE 15.

*Counting Ballots, Canvassing Votes, and Certifying Results
in Precinct and County.***§ 163-175. County board of elections to canvass returns.**

Editor's Note. —
For comment on election contests in North Carolina, see 55 N.C.L. Rev. 1228 (1977).

§ 163-181. When election contest stays certification of election.

Editor's Note. —
For comment on election contests in North Carolina, see 55 N.C.L. Rev. 1228 (1977).

SUBCHAPTER VIII. REGULATION OF ELECTION CAMPAIGNS.

ARTICLE 22A.

*Regulating Contributions and Expenditures
in Political Campaigns.***§ 163-278.19. Violations by corporations, business entities, labor unions, professional associations and insurance companies.**

Constitutionality. — This section is constitutional on its face and as applied to construe the plaintiff's payment of the defendant's advertising expenses as advances prohibited by the section since the prohibition thereof constitutes only a minimal intrusion on

plaintiff's constitutional rights, and is clearly reasonable in light of the purposes to be accomplished by the section. *Louchheim, Eng & People, Inc. v. Carson*, 35 N.C. App. 299, 241 S.E.2d 401 (1978).

The purposes of this section are identical to

those of its federal counterpart, namely, to protect the populace from undue influence by corporations and labor unions, and to insure the responsiveness of elected officials to the public at large. *Louchheim, Eng & People, Inc. v. Carson*, 35 N.C. App. 299, 241 S.E.2d 401 (1978).

The advance of money or anything of value

to a political candidate by a corporation, labor union or business entity constitutes an illegal contribution or expenditure within the meaning of this section. *Louchheim, Eng & People, Inc. v. Carson*, 35 N.C. App. 299, 241 S.E.2d 401 (1978).

§ 163-278.26. Appeals from State Board of Elections; early docketing.

Editor's Note. — For comment on election contests in North Carolina, see 55 N.C.L. Rev. 1228 (1977).

ARTICLE 22B.

Appropriations from the North Carolina Election Campaign Fund.

§ 163-278.41. Appropriations in general election years and other years. —

(a) Following the conclusion of the last primary or nominating convention held by a political party in a general election year in which a presidential election is held, the State chairman of that political party may apply to the State Treasurer for the disbursement of all funds deposited on behalf of such party in the North Carolina Election Campaign Fund. Upon receipt of such application, the State Treasurer shall forthwith, and every 30 days thereafter, pay over to said chairman all funds currently held by him on behalf of said chairman's political party, but provided that all such payments shall cease 30 days after the State Board of Elections has certified all of the results of the general election to the Secretary of State. Additionally and upon receipt of such application, the State Treasurer shall pay over to the said chairman all funds currently held by the State Treasurer in the "Presidential Election Year Candidates Fund" of that party, which funds shall be allocated and disbursed during the presidential election year among the candidates qualified therefor by the same procedure as the funds received from the North Carolina Campaign Election Fund are allocated among the candidates qualified therefor. Any remaining funds of the political party in the hands of the State Treasurer shall thereafter be held by him until eligible for distribution pursuant to this section.

(b) Following the conclusion of the last primary or nominating convention held by a political party in a general election year in which there is not a presidential election, the State chairman of the political party may apply to the State Treasurer for the disbursement of all funds deposited on behalf of such party in the North Carolina Election Campaign Fund. Upon receipt of such application, the State Treasurer shall forthwith, and every 30 days thereafter, pay over to said chairman all funds currently held by him on behalf of said chairman's political party provided that all such payments to the said chairman shall cease 30 days after the State Board of Elections has certified all of the results of the general election to the Secretary of State. Any remaining funds of the political party in the hands of the State Treasurer shall thereafter be held by him until eligible for distribution pursuant to this section.

(c) In each year in which no general election is held, each State chairman of a political party on behalf of which funds have been deposited in the North Carolina Election Campaign Fund may, on or between August 1 and September 1 thereof, apply to the State Treasurer for payment of an amount not to exceed fifty percent (50%) of the then available funds credited to the account of his party. Upon receipt of such application, the State Treasurer shall pay over to said State chairman an amount not to exceed fifty percent (50%) of the then available funds credited to the account of his party. Additionally and upon

receipt of such application, the State Treasurer shall place fifty percent (50%) of the said available funds in a separate interest bearing account to be known as the "Presidential Election Year Candidates Fund of the (name of the party) Party" to be disbursed in accord with the provisions of subsection (a) above. Any remaining funds of the political party in the hands of the State Treasurer shall thereafter be held by him until eligible for distribution pursuant to this section. Any interest earned on the funds deposited by the State Treasurer in such Presidential Election Year Campaign Fund shall be credited thereto. (1977, 2nd Sess., c. 1298, s. 2.)

Editor's Note. — The original Article 22B, comprising §§ 163-278.41 through 163-278.43 and covering the same subject matter as the present Article, was enacted by Session Laws 1975, c. 775, s. 2, effective for taxable years beginning on or after January 1, 1975, and expired by its own terms on December 31, 1977. See Session Laws 1975, c. 775, s. 3. The present

Article 22B, comprising §§ 163-278.41 through 163-278.45, was enacted by Session Laws 1977, 2nd Sess., c. 1298, s. 2, effective with respect to taxable years beginning on or after January 1, 1978. Session Laws 1977, 2nd Sess., c. 1298, s. 3, provides that the act shall expire on December 31, 1981.

§ 163-278.42. Distribution of campaign funds; legitimate expenses permitted. — (a) In a general election year in which a presidential election is held, every State chairman of a political party shall disburse fifty percent (50%) of all funds received from the North Carolina Campaign Election Fund to that political party. The remaining fifty percent (50%) of such funds shall be allocated to individual candidates for Governor, Lieutenant Governor, United States Senator, United States House of Representatives, Council of State, North Carolina Supreme Court and North Carolina Court of Appeals who have opposition in the general election. In the event a candidate does not decline such funds as are allocated to him, the State Chairman shall forthwith disburse such funds to such candidate.

(b) In a general election year in which there is not a presidential election, every State chairman of a political party shall disburse fifty percent (50%) of all funds received from the North Carolina Campaign Election Fund to that political party. The remaining fifty percent (50%) of such funds shall be allocated to individual candidates for Governor, Lieutenant Governor, United States Senator, United States House of Representatives, Council of State, North Carolina Supreme Court and North Carolina Court of Appeals who have opposition in the general election. In the event a candidate does not decline such funds as are allocated to him, the State Chairman shall forthwith disburse such funds to such candidate.

(c) In each year in which no general election is held, every State chairman of a political party shall disburse all funds received from the North Carolina Campaign Election Fund to that political party.

(d) The allocation of all funds to be allocated and disbursed to the individual candidates who are qualified to receive such funds shall be made by a committee composed of the State chairman of the political party, the State Treasurer of the political party who shall serve as an ex officio member, and the members of that political party who occupy the following offices: Governor, Lieutenant Governor, United States Senate, United States House of Representatives, and Council of State, provided however, that in the event the incumbent is not the nominee of the party for that office in that particular general election then the nominee and not the incumbent, shall serve on this committee. The State chairman shall serve as chairman of this committee. The allocation of funds among the several eligible candidates shall be determined solely in the discretion of the committee and such shall be disbursed by the State chairman of that political party only to the treasurer of a candidate or political committee. In the event that any candidate declines in whole or in part any funds allocated to him

or disbursed to him or fails to expend the same within 30 days following the general election, such funds shall revert to or be paid over to the political party of such candidate.

(e) Funds distributed from the North Carolina Campaign Election Fund or from the "Presidential Election Year Candidates Fund" of a political party shall only be expended for legitimate campaign expenses. By way of illustration but not by way of limitation, the following are examples of legitimate campaign expenses:

- (1) Radio, television, newspaper, and billboard advertising for and on behalf of a political party or candidate;
- (2) Leaflets, fliers, buttons, and stickers;
- (3) Campaign staff salaries, provided each staff member is listed by name and by the amount paid as salary and the amount paid as campaign expense reimbursement;
- (4) Travel expenses, lodging and food for candidate and staff;
- (5) Party headquarters operations related to upcoming general elections, including the purchase, maintenance and programming of computers to provide lists of voters, party workers, officers, committee members and participants in party functions, patterns of voting and other data for use in general election campaigns and party activities and functions prior thereto, the establishment and updating computer file systems of voter registration lists, State, district, county and precinct officers and committee member lists, party clubs or organization lists, the organizing of voter registration, fund raising and get-out-the-vote programs at the county level when conducted by State party personnel, and the preparation of reports required to be filed by State and federal laws and systems needed to prepare the same and keep records incident thereto.

(f) All moneys and funds previously designated by taxpayers being held by the North Carolina Secretary of Revenue and being held by the North Carolina State Treasurer which moneys and funds have not been disbursed or delivered to a political party as of June 16, 1978, when disbursed shall be allocated by the State Chairman of the political party as follows: sixty-two and one-half percent (62½%) of such funds to the political party for legitimate general election campaign expenditures; thirty-seven and one-half percent (37½%) to the eligible candidates as determined by the committee established under this Article.

(g) It shall be unlawful for any person, candidate, political committee or political party to use either directly or indirectly any part of funds distributed from the North Carolina Campaign Election Fund or the Presidential Election Year Candidates Fund of any political party for the support or assistance either directly or indirectly of any candidate in a primary election, for support or assistance relating to the selection of a candidate at a political convention or by the executive committee of a party, for the payment or repayment of any debt or obligation of whatsoever kind or nature incurred by any person, candidate or political committee in a primary election, the selection of a candidate at a political convention or by the executive committee of a party, or for the support, promotion or opposition of a national, State or local referendum, bond election or constitutional amendment. (1977, 2nd Sess., c. 1298, s. 2.)

§ 163-278.43. Report each year to State Board of Elections; suspension of disbursements; willful violations a misdemeanor. — (a) The State chairman of each political party and the treasurer of each candidate or political committee receiving funds from the North Carolina Campaign Election Fund or the Presidential Election Year Candidates Fund or both shall maintain a full and complete record of their receipts and any and all subsequent expenditures and disbursements thereof, and such shall be substantiated by any records, receipts, and information that the Executive Director of the State Board of Elections shall

require. Such record shall be centrally located and shall be readily available at reasonable hours for public inspection. Treasurers of political committees and candidates shall maintain all such funds received from the North Carolina Campaign Election Fund or a Presidential Election Year Candidates Fund or both in a separate account, and shall not allow the same to be commingled with the funds from any other source.

(b) By December 31 of each year, the State chairman of each political party receiving funds from the North Carolina Campaign Election Fund or a Presidential Election Year Candidates Fund and the treasurer of all other political committees or candidates receiving any such funds in the 12 preceding months shall file with the State Board of Elections an itemized statement reporting all receipts, expenditures and disbursements from the date of the last report and attached to such report shall be the verification of such chairman or treasurer that all such funds received were expended in accordance with the provisions of this Article. If the Executive Secretary of the State Board of Elections determines and finds as a fact that any such funds were not disbursed or expended in accordance with this Article, he shall order such political party, political committee or candidate to reimburse the amount improperly expended or disbursed to the General Fund of the State and such political party, political committee or candidate shall not receive further disbursements from the North Carolina Campaign Election Fund or a Presidential Election Year Candidates Fund until such reimbursement has been accomplished in full. A copy of any such order shall be forwarded to the State Treasurer, which shall constitute notice to him to suspend further disbursements from the campaign fund. (1977, 2nd Sess., c. 1298, s. 2.)

§ 163-278.44. Crime; punishment. — Any individual person, candidate, political committee, or treasurer who willfully and intentionally violates any of the provisions of this Article, shall be guilty of a misdemeanor and shall be fined not more than one thousand dollars (\$1,000) if an individual, and not more than five thousand dollars (\$5,000) if a person other than an individual, or imprisoned for not more than one year, or be both fined and imprisoned. (1977, 2nd Sess., c. 1298, s. 2.)

§ 163-278.45. Definitions. — The terms "candidate," "expend," "individual," "person," "political committee," and "treasurer" as used in this Article shall be as defined in G.S. 163-278.6. (1977, 2nd Sess., c. 1298, s. 2.)

Chapter 165.

Veterans.

ARTICLE 3.

Minor Spouses of Veterans.

§ 165-18. Rights conferred.

Editor's Note. — For article, "The Contracts of Minors Viewed from the Perspective of Fair Exchange," see 50 N.C.L. Rev. 517 (1972).

Constitution of North Carolina

ARTICLE I

DECLARATION OF RIGHTS

Section 1. *The equality and rights of persons.*

Editor's Note. —

For a note on the use of state constitutional law to void occupational licensing statutes which

unreasonably restrict freedom of occupational choice, see 13 Wake Forest L. Rev. 507 (1977).

Sec. 16. *Ex post facto laws.*

Cited in State v. Kirkman, 293 N.C. 447, 238 S.E.2d 456 (1977).

Sec. 18. *Courts shall be open.*

Editor's Note. —

For note on criminal defendants' rights during sentencing, see 50 N.C.L. Rev. 925 (1977).

The public, and especially the parties, are entitled to see and hear what goes on in the court. That courts are open is one of the sources

of their greatest strength. In re Nowell, 293 N.C. 235, 237 S.E.2d 246 (1977).

The trial and disposition of criminal cases is the public's business and ought to be conducted in public in open court. In re Nowell, 293 N.C. 235, 237 S.E.2d 246 (1977).

Sec. 19. *Law of the land; equal protection of the laws.*

I. GENERAL CONSIDERATION.

Editor's Note. —

For a note on the use of state constitutional law to void occupational licensing statutes which unreasonably restrict freedom of occupational choice, see 13 Wake Forest L. Rev. 507 (1977).

Applied in Poole v. Hanover Brook, Inc., 34 N.C. App. 550, 239 S.E.2d 479 (1977); Duggins v. North Carolina State Bd. of Cert. Pub. Accountant Exmrs., 294 N.C. 120, 240 S.E.2d 406 (1978).

Quoted in State v. Mathis, 293 N.C. 6650, 239 S.E.2d 245 (1977).

Cited in State v. Giles, 34 N.C. App. 112, 237 S.E.2d 305 (1977); North Carolina Auto. Rate Administrative Office v. Ingram, 35 N.C. App. 578, 242 S.E.2d 205 (1978).

II. RIGHTS OF DEFENDANTS IN CRIMINAL CASES.

Section Prohibits Double Jeopardy. —

In accord with 2nd paragraph in 1977 Cum. Supp. See State v. Shuler, 293 N.C. 34, 235 S.E.2d 226 (1977).

When Jeopardy Attaches. —

In accord with 1st paragraph in 1977 Cum.

Supp. — See State v. Shuler, 293 N.C. 34, 235 S.E.2d 226 (1977).

Double Jeopardy Provision Not Violated by Mistrial, etc. —

Where it was unchallenged that an expression of opinion by a law-enforcement officer as to the weakness of the State's case had reached the jury box, the juror's statement that he would not be prejudiced by this remark would not, standing alone, prevent the trial judge from exercising his discretion and declaring a mistrial and the defendant's subsequent plea of former jeopardy was properly denied. State v. Shuler, 293 N.C. 34, 235 S.E.2d 226 (1977).

The decision to grant a mistrial is a decision well within the trial judge's discretion when faced with the occurrence of some incident of a nature that would render impossible a fair and impartial trial under the law. State v. Shuler, 293 N.C. 34, 235 S.E.2d 226 (1977).

Where Mistrial Was Ordered for Physical Necessity, etc. —

A subsequent trial of a defendant, following the termination of earlier proceedings upon an order of mistrial, is not precluded by a plea of former jeopardy where the mistrial was granted,

over defendant's objections, due to "a physical necessity or the necessity of doing justice." *State v. Shuler*, 293 N.C. 34, 235 S.E.2d 226 (1977).

"Necessity of doing justice," etc. —

The test of "necessity of doing justice" does not exist solely for the benefit of a defendant. It is fundamental in our system of jurisprudence that each party to an action is entitled to a fair and impartial trial. *State v. Shuler*, 293 N.C. 34, 235 S.E.2d 226 (1977).

Duty of Judge Ordering Mistrial, etc. —

In capital cases the trial court must make findings of fact upon granting a mistrial and place them in the record so that the court's action may be reviewed on appeal. *State v. Shuler*, 293 N.C. 34, 235 S.E.2d 226 (1977).

Assistance of Counsel Means Effective Assistance. — The right to counsel is not intended to be simply an empty formality, but is intended to guarantee effective assistance of counsel. *State v. Hensley*, 294 N.C. 231, 240 S.E.2d 332 (1978).

And May Be Considered on Direct Appeal. — The question of alleged failure of counsel to render effective representation can be considered on direct appeal. *State v. Hensley*, 294 N.C. 231, 240 S.E.2d 332 (1978).

There are no set rules to determine whether a defendant has been deprived effective assistance of counsel; rather each case must be

approached upon an ad hoc basis, viewing circumstances as a whole in order to determine this question. *State v. Hensley*, 294 N.C. 231, 240 S.E.2d 332 (1978).

Right to Effective Assistance of Counsel Not Denied. — In the absence of any showing that the withdrawal of a motion to consolidate for trial charges against two defendants in any way prejudices defendant's case and denies him his right to effective counsel, there is no error in the denial of the motion to continue. *State v. Minshew*, 33 N.C. App. 593, 235 S.E.2d 866 (1977).

Reasonable Time for Defense. —

Implicit in the constitutional right to effective counsel is that an accused and his counsel shall have a reasonable time to investigate, prepare and present the defense. *State v. Minshew*, 33 N.C. App. 593, 235 S.E.2d 866 (1977).

Rights to Contract and Engage in Business Are not Absolute. — Freedom to contract and engage in a lawful business activity are rights guaranteed by the State and federal constitutions. However, these rights are not absolute, and limitations thereon imposed by the legislature are not violative of the constitutional provisions so long as they are reasonable in light of the purposes to be accomplished. *Louchheim, Eng & People, Inc. v. Carson*, 35 N.C. App. 299, 241 S.E.2d 401 (1978).

Sec. 20. *General warrants.*

It does not prohibit seizure, etc. —

The constitutional guarantees against unreasonable search and seizure do not prohibit a seizure of evidence without a warrant when no search is required and the seized article is in plain view. *State v. Small*, 293 N.C. 646, 239 S.E.2d 429 (1977).

Evidence which is obtained, etc. —

Evidence obtained by an unreasonable search and seizure is inadmissible. *State v. Small*, 293 N.C. 646, 239 S.E.2d 429 (1977).

Sec. 23. *Rights of accused.*

II. RIGHT TO BE INFORMED OF ACCUSATION.

And to Prepare and Present Defense. —

Due process requires that every defendant be allowed a reasonable time and opportunity to investigate and produce competent evidence, if he can, in defense of the crime with which he stands charged and to confront his accusers with other testimony. *State v. Thomas*, 294 N.C. 105, 240 S.E.2d 426 (1978).

The time fixed in a bill of indictment usually is not an essential fact, and the State may prove

When the evidence is delivered to a police officer, etc. —

When evidence is delivered to a police officer upon request and without compulsion or coercion, the constitutional provisions prohibiting unreasonable search and seizure are not violated. *State v. Small*, 293 N.C. 646, 239 S.E.2d 429 (1977).

the crime was committed on another date. Time is not ordinarily of the essence of an offense, but when the State fixes the date in the indictment and the defendant presents evidence of an alibi relating to that date, time becomes of the essence. The State may not, after the defendant has presented his alibi evidence and rested his case, introduce evidence tending to show the defendant's commission of the crime charged on another date. To permit a conviction on such evidence would violate rights guaranteed by this section. *State v. Vincent*, 35 N.C. App. 369, 241 S.E.2d 390 (1978).

IV. RIGHT TO COUNSEL.

Best Available Counsel, etc., Not Guaranteed. —

In accord with 1977 Cum. Supp. See *State v. Mathis*, 293 N.C. 660, 239 S.E.2d 245 (1977).

This right is not intended to be an empty formality.

The right to counsel is not intended to be simply an empty formality, but is intended to guarantee effective assistance of counsel. *State v. Mathis*, 293 N.C. 660, 239 S.E.2d 245 (1977); *State v. Hensley*, 294 N.C. 231, 240 S.E.2d 332 (1978).

Counsel Must Have Opportunity to Investigate, etc. —

Implicit in the constitutional right to effective counsel is that an accused and his counsel shall have a reasonable time to investigate, prepare and present the defense. *State v. Minshew*, 33 N.C. App. 593, 235 S.E.2d 866 (1977).

Determining Inadequacy of Representation.

The mere fact that the defendant was convicted does not show that his counsel was either incompetent, neglectful or ineffective. *State v. Mathis*, 293 N.C. 660, 239 S.E.2d 245 (1977).

Even the most skilled counsel for the defense is not required to use dishonorable means, subterfuge or false testimony in order to confuse and mislead the court or the jury and thus procure a verdict favorable to the defendant. *State v. Mathis*, 293 N.C. 660, 239 S.E.2d 245 (1977).

Farce and Mockery, etc. —

In accord with 1977 Cum. Supp. See *State v. Mathis*, 293 N.C. 660, 239 S.E.2d 245 (1977).

There are no set rules to determine whether a defendant has been deprived of effective

assistance of counsel; rather each case must be approached upon an ad hoc basis, viewing circumstances as a whole in order to determine this question. *State v. Hensley*, 294 N.C. 231, 240 S.E.2d 332 (1978).

The question of alleged failure of counsel to render effective representation can be considered on direct appeal. *State v. Hensley*, 294 N.C. 231, 240 S.E.2d 332 (1978).

Right to Effective Assistance of Counsel not Denied. — In the absence of any showing that the withdrawal of a motion to consolidate for trial charges against two defendants in any way prejudiced defendant's case and denied him his right to effective counsel, there was no error in the denial of the motion to continue. *State v. Minshew*, 33 N.C. App. 593, 235 S.E.2d 866 (1977).

V. SELF-INCRIMINATION.

Waiver of Privilege. —

A defendant who chooses to testify waives his privilege against compulsory self-incrimination with respect to the testimony he gives, and that waiver is no less effective or complete because the defendant may have been motivated to take the witness stand in the first place only by reason of the strength of the lawful evidence adduced against him. *State v. Wills*, 293 N.C. 546, 240 S.E.2d 328 (1977).

A defendant has a right not to be compelled to be a witness against himself in any criminal case. *State v. Wills*, 293 N.C. 546, 240 S.E.2d 328 (1977).

Cited in *State v. Palmer*, 293 N.C. 633, 239 S.E.2d 406 (1977); *State v. Eatman*, 34 N.C. App. 665, 239 S.E.2d 633 (1977).

Sec. 24. Right of jury trial in criminal cases.

Applied in *State v. Boone*, 293 N.C. 702, 239 S.E.2d 459 (1977).

Sec. 28. Imprisonment for debt.

Payment of Restitution Is Valid Condition for Suspension of Sentence. — Subject to the prohibition contained in this section against imprisonment for debt, except in cases of fraud, payment of restitution by a criminal defendant to the victims of his crime may be a valid condition for suspension of sentence. *State v. McIntyre*, 33 N.C. App. 557, 235 S.E.2d 920 (1977).

Or for Acceptance of Plea Bargain. — Payment of restitution by a criminal defendant

to the victims of his crime may be a valid condition for acceptance of a plea bargain. *State v. McIntyre*, 33 N.C. App. 557, 235 S.E.2d 920 (1977).

Restitution Must Be to Specific Party. — When restitution is ordered as result of a plea bargain it must be to a specific aggrieved party and this party must be named in the judgment. *State v. McIntyre*, 33 N.C. App. 557, 235 S.E.2d 920 (1977).

ARTICLE IV

JUDICIAL

Sec. 12. *Jurisdiction of the General Court of Justice.*

Quoted in *State v. McIntyre*, 33 N.C. App. 557, 235 S.E.2d 920 (1977).

Cited in *Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 240 S.E.2d 338 (1978).

Sec. 17. *Removal of Judges, Magistrates and Clerks.*

Article 30 of Chapter 7A Constitutional. — In view of the constitutional mandate in subsection (2) of this section that the General Assembly shall prescribe a procedure for the censure and removal of judges in addition to impeachment and address as provided in subsection (1), respondent's contention that the General Assembly in enacting Article 30 of Chapter 7A abrogated its legislative duties by unconstitutionally delegating them to the Judicial Standards Commission, a creature of the General Assembly, is without merit. In re Nowell, 293 N.C. 235, 237 S.E.2d 246 (1977).

Article 30 of Chapter 7A is not unconstitutional because enacted in advance of the ratification of this section since the General Assembly has power to enact a statute not authorized by the present Constitution where the statute is passed in anticipation of an amendment authorizing it or provides that it shall take effect upon the adoption of such an amendment. In re Nowell, 293 N.C. 235, 237 S.E.2d 246 (1977).

Quoted in *In re Hardy*, 294 N.C. 90, 240 S.E.2d 367 (1978).

ARTICLE V

FINANCE

Sec. 2. *State and local taxation.*

Stated in *In re North Carolina Forestry Foundation, Inc.*, 35 N.C. App. 414, 242 S.E.2d 492 (1978).

ARTICLE VI

SUFFRAGE AND ELIGIBILITY TO OFFICE

Sec. 2. *Qualifications of voter.***Editor's Note.** —

For survey of 1972 case law on student suffrage, see 51 N.C.L. Rev. 1060 (1973).

Sec. 9. *Dual office holding.*

Cited in *Arnold v. Varnum*, 34 N.C. App. 22, 237 S.E.2d 272 (1977).

ARTICLE VII

LOCAL GOVERNMENT

Section 1. *General Assembly to provide for local government.*

The fixing of boundaries of municipal corporations is a permissible legislative function. *Jones v. Jeanette*, 34 N.C. App. 526, 239 S.E.2d 293 (1977).

Court Inquiry into Motives of Legislature.

— Ordinarily, the courts have no authority to inquire into the motives of the legislature in the incorporation of political subdivisions. *Jones v. Jeanette*, 34 N.C. App. 526, 239 S.E.2d 293 (1977).

ARTICLE X

HOMESTEADS AND EXEMPTIONS

Sec. 2. *Homestead exemptions.*

I. EXEMPTION GENERALLY.

Comparison of former section with the present subsection (1) reveals that the major difference is that under the former the homestead could not exceed \$1000 in value, while under the present Constitution the homestead shall be to a value fixed by the General Assembly but not less than \$1000. *Seeman Printery, Inc. v. Schinhan*, 34 N.C. App. 637, 239 S.E.2d 744 (1977).

Power to Increase Value of Homestead Exemption. — The Constitution expressly vests in the General Assembly, not in the courts, the exclusive power to increase the value of the homestead exemption. *Seeman Printery, Inc. v. Schinhan*, 34 N.C. App. 637, 239 S.E.2d 744 (1977).

Exemption of Dwelling House Regardless of Value. — The constitutional and statutory

enactments relating to the homestead exemption cannot be so construed as to permit exemption of an entire usable dwelling house, regardless of its value. *Seeman Printery, Inc. v. Schinhan*, 34 N.C. App. 637, 239 S.E.2d 744 (1977).

Where Allotment Useless to Debtor and Impairs Value of Remaining Property. — Where the debtor requested that the allotment of his homestead begin at a point at the front door of his dwelling, with the result that the entire area allotted was located in the hallway adjacent to the front door of the house, the fact that the allotment was useless to the debtor and impaired the value of the remaining property available for satisfaction of the creditor's judgment did not entitle the debtor to claim his exemption in the entire dwelling. *Seeman Printery, Inc. v. Schinhan*, 34 N.C. App. 637, 239 S.E.2d 744 (1977).

ARTICLE XI

PUNISHMENTS, CORRECTIONS, AND CHARITIES

Sec. 4. *Welfare policy; board of public welfare.*

Quoted in Vaughn v. Durham County Dep't of Social Servs., 34 N.C. App. 416, 240 S.E.2d 456 (1977).

Appendix I. Rules of Practice in the General Court of Justice

(2A) NORTH CAROLINA RULES OF APPELLATE PROCEDURE

Article II. Appeals from Judgments and Orders of Superior Courts and District Courts

RULE

7. [Reserved.]

Article III. Review by Supreme Court of Appeals

Originally Docketed in Court of Appeals: Appeals of Right; Discretionary Review

14. Appeals of Right from Court of Appeals to
Supreme Court Under G.S. § 7A-30.

(d) Briefs.

(1) Filing and Service; Copies.

(2) Failure to File or Serve.

17. Appeal Bond In Appeals Under G.S.
§§ 7A-30, 7A-31.

(a) Appeal of Right.

(b) Discretionary Review of Court of
Appeals Determination.

(c) Discretionary Review by Supreme Court
Before Court of Appeals Deter-
mination.

(d) Appeals in Forma Pauperis.

Article IV. Direct Appeals From Administrative

Agencies to the Court of Appeals

18. Taking Appeal; Record on Appeal —
Composition and Settlement.

RULE

(a) General.

(b) Time and Method for Taking Appeals.

(d) Settling the Record on Appeal.

(1) By Agreement.

(2) By Appellee's Approval of
Appellant's Proposed Record on
Appeal.

(3) By Conference, Referee, or Agency
Head; Failure to Request
Settlement.

19. Parties to Appeal From Agencies.

(d) From the Disciplinary Hearing
Commission of the North Carolina
State Bar.

Article VI. General Provisions

27. Computation and Extension of Time.

(c) Extensions of Time; by Which Court
Granted.

30. Oral Argument.

(e) Decision of Appeal Without Publication
of an Opinion.

ARTICLE I. APPLICABILITY OF RULES

Rule 1

Scope of Rules: Trial Tribunal Defined

Mandatory. —

In accord with 2nd paragraph in 1977 Cum.
Supp. See *White v. Lawrence*, 33 N.C. App. 631,
236 S.E.2d 30 (1977).

Cited in *Indian Trace Co. v. Sanders*, 33 N.C.
App. 386, 235 S.E.2d 91 (1977).

ARTICLE II. APPEALS FROM JUDGMENTS AND ORDERS OF SUPERIOR COURTS AND DISTRICT COURTS

Rule 3

Appeal in Civil Cases — How and When Taken

Editor's Note. — For note discussing abandonment of appeal, see 56 N.C.L. Rev. 573 (1978).

Applied in *Arnold v. Varnum*, 34 N.C. App. 22, 237 S.E.2d 272 (1977).

Rule 7

[Reserved]

Editor's Note. — Rule 7 was repealed by amendment effective July 1, 1978, adopted June 19, 1978.

The order repealing this rule provides:

"Repeal of Rule 7 and limiting Rule 17's application to civil cases are to conform the Rules of Appellate Procedure to Chap. 711, 1977 Session Laws, particularly that portion of Chap. 711 codified as G.S. 15A-1449 which provides, 'In criminal cases no security for costs is required upon appeal to the appellate division.' Section 33 of Chap. 711 repealed, among other statutes, G.S. 15-180 and 15-181 upon which Rule 7 was based. Chap. 711 becomes effective 1 July 1978. While G.S. 15A-1449, strictly construed, does not apply to cost bonds in appeals from or petitions

for further review of decisions of the Court of Appeals, the Supreme Court believes the legislature intended to eliminate the giving of security for costs in criminal cases on appeal or on petition to the Supreme Court from the Court of Appeals. The Court has, therefore, amended Rule 17 to comply with what it believes to be the legislative intent in this area.

"The appellate courts, pursuant to Rules 12, 13, and 15, will continue to collect advance deposits fixed by the clerks to cover the costs of reproducing the record on appeal and briefs.

"Rather than renumber the Rules, the Court has determined to reserve Rule 7 for future use."

Rule 9

The Record on Appeal—Function, Composition, and Form

A judgment is a necessary part of the record on appeal of a criminal action. *State v. Gilliam*, 33 N.C. App. 490, 235 S.E.2d 421 (1977).

Minutes Are Not Substitute for Copy of Judgment. — The "minutes" of the trial court in a criminal action included in the record on appeal are not a substitute for a copy of the judgment. *State v. Gilliam*, 33 N.C. App. 490, 235 S.E.2d 421 (1977).

Omission of Necessary Part of Record. —

When a necessary part of the record on appeal of a criminal action has been omitted, the appeal will be dismissed. *State v. Gilliam*, 33 N.C. App. 490, 235 S.E.2d 421 (1977).

Applied in *State v. Minshew*, 33 N.C. App. 593, 235 S.E.2d 866 (1977); *State v. Spruill*, 33 N.C. App. 731, 236 S.E.2d 717 (1977); *State v. Hugenberg*, 34 N.C. App. 91, 237 S.E.2d 327 (1977).

Rule 10

Exceptions and Assignments of Error in Record on Appeal

Applied in *State v. Woods*, 293 N.C. 58, 235 S.E.2d 47 (1977); *Productive Tool Corp. v. Pilot Freight Carriers, Inc.*, 33 N.C. App. 241, 234 S.E.2d 758 (1977); *Moore v. Smith*, 33 N.C. App.

275, 235 S.E.2d 102 (1977); *State v. Tuttle*, 33 N.C. App. 465, 235 S.E.2d 412 (1977); *State v. Gilliam*, 33 N.C. App. 490, 235 S.E.2d 421 (1977); *State v. Minshew*, 33 N.C. App. 593, 235 S.E.2d

866 (1977); Neasham v. Day, 34 N.C. App. 53, 237 S.E.2d 287 (1977); State v. Cunningham, 34 N.C. App. 72, 237 S.E.2d 334 (1977); Parker v. Williams, 34 N.C. App. 563, 239 S.E.2d 270 (1977); State v. Graham, 35 N.C. App. 700, 242 S.E.2d 512 (1978).

Quoted in Sellers v. City of Asheville, 33 N.C. App. 544, 236 S.E.2d 283 (1977); Cole v. Stevenson, 447 F. Supp. 1268 (E.D.N.C. 1978).

Cited in State v. Willard, 293 N.C. 394, 238 S.E.2d 509 (1977); Nationwide Mut. Ins. Co. v. Chantos, 293 N.C. 431, 238 S.E.2d 597 (1977);

State v. Cates, 293 N.C. 462, 238 S.E.2d 465 (1977); Whitley's Elec. Serv., Inc. v. Sherrod, 293 N.C. 498, 238 S.E.2d 607 (1977); Benton v. W.H. Weaver Constr. Co., 34 N.C. App. 421, 238 S.E.2d 655 (1977); State v. Hice, 34 N.C. App. 468, 238 S.E.2d 619 (1977); Tadlock v. C.L. Snipes Motors, Inc., 34 N.C. App. 557, 239 S.E.2d 311 (1977); State v. Truesdale, 34 N.C. App. 579, 239 S.E.2d 286 (1977); State v. Collins, 35 N.C. App. 250, 241 S.E.2d 98 (1978); Bridger v. Mangum, 35 N.C. App. 569, 241 S.E.2d 726 (1978); Sutton v. Sutton, 35 N.C. App. 670, 242 S.E.2d 644 (1978).

Rule 11

Settling the Record on Appeal; Certification

Record Must Be Settled Before Certification. — The clear implication of subdivision (e) of this rule is that the record must be settled before certification. State v. Gilliam, 33 N.C. App. 490, 235 S.E.2d 421 (1977).

Court Must Have Certification of Settled Record. — The appellate court must be assured that it has before it the certification of the clerk

to the settled record, not the certification of the clerk to a record presented by the appellant. State v. Gilliam, 33 N.C. App. 490, 235 S.E.2d 421 (1977).

Applied in Indian Trace Co. v. Sanders, 33 N.C. App. 386, 235 S.E.2d 91 (1977); Burkheimer v. Coble, 35 N.C. App. 127, 239 S.E.2d 852 (1978).

Rule 12

Filing the Record; Docketing the Appeal; Copies of Record

Applied in Indian Trace Co. v. Sanders, 33 N.C. App. 386, 235 S.E.2d 91 (1977); White v.

Lawrence, 33 N.C. App. 631, 236 S.E.2d 30 (1977).

ARTICLE III. REVIEW BY SUPREME COURT OF APPEALS ORIGINALLY DOCKETED IN COURT OF APPEALS: APPEALS OF RIGHT; DISCRETIONARY REVIEW

Rule 14

Appeals of Right from Court of Appeals to Supreme Court Under G.S. § 7A-30

(d) Briefs.

(1) **Filing and Service; Copies.** Within 20 days after filing notice of appeal in the Supreme Court, the appellant shall file with the Clerk of the Supreme Court and serve upon all other parties copies of a new brief prepared in conformity with Rule 28, presenting only those questions upon which review by the Supreme Court is sought; provided, however, that when the appeal is based solely upon the existence of a substantial constitutional question the appellant shall file and serve a new brief within 20 days after entry of the order of the Supreme Court which determines for the purpose of retaining the appeal on the docket that a substantial constitutional question does exist. Within 15 days after the service of the appellant's brief upon him, the appellee shall similarly file and serve copies of a new brief.

The parties need file but single copies of their respective briefs. At the time of filing a brief, the party shall pay to the Clerk a deposit fixed by the Clerk to cover the cost of reproducing copies of the brief. The Clerk will reproduce and distribute copies as directed by the Court.

In civil appeals in forma pauperis a party need not pay the deposit for reproducing copies, but at the time of filing his original new brief shall also deliver to the clerk two legible copies thereof reproduced by typewriter carbon or other means.

(2) **Failure to File or Serve.** If an appellant fails to file and serve his brief within the time allowed, the appeal may be dismissed on motion of an appellee or on the court's own initiative. If an appellee fails to file and serve his brief within the time allowed, he may not be heard in oral argument except by permission of the court.

Editor's Note. — The amendment adopted Jan. 31, 1977, added the proviso to the first sentence of subdivision (d)(1).

As the rest of this rule was not changed by the amendment, only subdivision (d) is set out.

Rule 16

Scope of Review of Decisions of Court of Appeals

Applied in North Carolina State Ports Auth. v. Lloyd A. Fry Roofing Co., 294 N.C. 73, 240 S.E.2d 345 (1978).

Rule 17

Appeal Bond In Appeals Under

G.S. §§ 7A-30, 7A-31

(a) **Appeal of Right.** In all appeals of right from the Court of Appeals to the Supreme Court, in civil cases the party who takes appeal shall, upon filing the record on appeal in the Supreme Court, file with the Clerk of that Court a written undertaking, with good and sufficient surety in the sum of \$200, or deposit cash in lieu thereof, to the effect that he will pay all costs awarded against him on the appeal to the Supreme Court.

(b) **Discretionary Review of Court of Appeals Determination.** When the Supreme Court on petition of a party certifies a civil case for review of a determination of the Court of Appeals, the petitioner shall file an undertaking for costs in the form provided in subdivision (a). When the Supreme Court on its own initiative certifies a case for review of a determination of the Court of Appeals, no undertaking for costs shall be required of any party.

(c) **Discretionary Review by Supreme Court Before Court of Appeals Determination.** When a civil case is certified for review by the Supreme Court before being determined by the Court of Appeals, the undertaking on appeal initially filed in the Court of Appeals shall stand for the payment of all costs incurred in either the Court of Appeals or the Supreme Court and awarded against the party appealing.

(d) **Appeals in Forma Pauperis.** No undertakings for costs are required of a party appealing in forma pauperis.

Editor's Note. — The amendment effective July 1, 1978, adopted June 19, 1978, inserted "in civil cases" near the beginning of subsection (a) and inserted "civil" preceding "case" in the first sentence of subsection (b) and near the beginning of subsection (c).

The order which amended this rule and repealed Rule 7 provides:

"Repeal of Rule 7 and limiting Rule 17's application to civil cases are to conform the Rules of Appellate Procedure to Chap. 711, 1977 Session Laws, particularly that portion of Chap. 711 codified as G.S. 15A-1449 which provides, 'In criminal cases no security for costs is required upon appeal to the appellate division.' Section 33 of Chap. 711 repealed, among other statutes,

G.S. 15-180 and 15-181 upon which Rule 7 was based. Chap. 711 becomes effective 1 July 1978. While G.S. 15A-1449, strictly construed, does not apply to cost bonds in appeals from or petitions for further review of decisions of the Court of Appeals, the Supreme Court believes the legislature intended to eliminate the giving of security for costs in criminal cases on appeal or on petition to the Supreme Court from the Court of Appeals. The Court has, therefore, amended

Rule 17 to comply with what it believes to be the legislative intent in this area.

"The appellate courts, pursuant to Rules 12, 13, and 15, will continue to collect advance deposits fixed by the clerks to cover the costs of reproducing the record on appeal and briefs.

"Rather than renumber the Rules, the Court has determined to reserve Rule 7 for future use."

ARTICLE IV. DIRECT APPEALS FROM ADMINISTRATIVE AGENCIES TO THE COURT OF APPEALS

Rule 18

Taking Appeal; Record on Appeal — Composition and Settlement

(a) **General.** Appeals of right under G.S. § 7A-29 to the Court of Appeals from the Utilities Commission, the Industrial Commission, the Commissioner of Insurance, and the Disciplinary Hearing Commission of the North Carolina State Bar (hereinafter "agencies" or "agency") shall be in accordance with the procedures provided in these rules for appeals of right from the courts of the trial divisions, except as hereinafter provided in this Rule 18, Rule 19, and Rule 20.

(b) **Time and Method for Taking Appeals.** The times and methods for taking appeals from the agencies shall be as provided respectively in G.S. § 62-90(a) for appeals from the Utilities Commission; G.S. § 97-86 for appeals from the Industrial Commission and G.S. § 58-9.5(1) and (2) for appeals from the Commissioner of Insurance.

The time and methods for taking appeals from the Disciplinary Hearing Commission of the North Carolina State Bar are: Either party to the proceeding, within 30 days after receipt of a copy of the order of the Commission, which is to be sent by registered or certified mail, may appeal from the decision of the Commission to the Court of Appeals for alleged errors of law under the same terms and conditions as govern appeals from the Superior Court to the Court of Appeals in ordinary civil actions.

In case of an appeal from the decision of the Commission to the Court of Appeals, the appeal shall operate as a supersedeas; and any discipline imposed by the Commission shall be stayed pending determination of the appeal.

(d) **Settling the Record on Appeal.** The record on appeal may be settled for certification and filing in the Court of Appeals by any of the following methods:

(1) **By Agreement.** Within 30 days after appeal is taken, the parties may by agreement entered in the record on appeal constitute a proposed record on appeal prepared by any party in accordance with this Rule 18 as the record on appeal.

(2) **By Appellee's Approval of Appellant's Proposed Record on Appeal.** If the record on appeal is not settled by agreement under Rule 18(d)(1), the appellant may, within 30 days after appeal is taken, file in the office of the agency and serve upon all other parties a proposed record on appeal constituted in accordance with the provisions of Rule 18(c). Within 15 days after service of the proposed record on appeal upon him, an appellee may file in the main office of the agency and serve upon all other parties a notice of approval of the proposed record on appeal, or objections, amendments, or a proposed alternative record on appeal. If all appellees within the times allowed them either file notices of approval or fail to file either notices of approval or objections, amendments, or proposed alternative records on appeal, appellant's proposed record on appeal thereupon constitutes the record on appeal.

(3) **By Conference, Referee, or Agency Head; Failure to Request Settlement.** If any appellee timely files objections, amendments, or a proposed alternative record on appeal, the appellant or any other appellee, within 10 days after expiration of the time within which the appellee last served might have filed, may in writing request the Chairman of the Utilities Commission or the Commissioner of Insurance to convene a conference to attempt settlement of the record on appeal in appeals from their respective agencies, or the Chairman of the Industrial Commission to settle the record on appeal in appeals from that agency, or the Chairman of the Hearing Committee of the Disciplinary Hearing Commission of the North Carolina State Bar to settle the record on appeal in appeals from that agency. A copy of such request shall be served upon all other parties. If only one appellee or only one set of appellees proceeding jointly have so filed and no other party makes timely request for agency conference or settlement by order, the record on appeal is thereupon settled in accordance with the one appellee's, or one set of appellees', objections, amendments, or proposed alternative record on appeal. If more than one appellee proceeding separately have so filed, failure of the appellant to make timely request for agency conference or for settlement by order results in abandonment of the appeal as to those appellees, unless within the time allowed any appellee makes request in the same manner.

Within 20 days after receipt of a request for agency-supervised conference in appeals from the Utilities Commission and the Commissioner of Insurance, the agency head shall convene a conference of all parties to the appeal by written notice. At the conference the agency head or his delegate shall attempt to accomplish a settlement of the record on appeal by agreement of the parties. If no such agreement is accomplished, the agency head shall forthwith request the Chief Judge of the Court of Appeals to appoint a referee to settle the record on appeal. The referee so appointed shall proceed after conference with all parties to settle the record on appeal in accordance with the terms of the reference order.

Upon receipt of a request for settlement of the record on appeal the Chairman of the Industrial Commission or the Chairman of the Hearing Committee of the Disciplinary Hearing Commission of the North Carolina State Bar shall by written notice to counsel for all parties set a place and a time not later than 20 days after receipt of the request for a hearing to settle the record on appeal. At the hearing the Chairman shall settle the record on appeal by order.

Editor's Note. — The amendment adopted June 21, 1977, added the Disciplinary Hearing Commission of the North Carolina State Bar to the list of agencies in subsection (a), added the second and third paragraphs of subsection (b), added the language beginning "or the Chairman of the Hearing Committee" at the end of the first sentence of the first paragraph of

subdivision (d)(3) and inserted "or the Chairman of the Hearing Committee of the Disciplinary Hearing Commission of the North Carolina State Bar" near the beginning of the third paragraph of subdivision (d)(3).

As subsections (c), (e) and (f) were not changed by the amendment, they are not set out.

Rule 19

Parties to Appeal From Agencies

(d) **From the Disciplinary Hearing Commission of the North Carolina State Bar.** The complainant in the original complaint before the Disciplinary Hearing Commission, each of the other parties to the proceeding, the Chairman of the Hearing Committee or the Chairman of the Commission may be parties of record to and participate in the appeal as appellants or appellees according to their respective interests.

Editor's Note. — The amendment adopted June 21, 1977, added subsection (d).

As the rest of this rule was not changed by the amendment, only subsection (d) is set out.

ARTICLE V. EXTRAORDINARY WRITS

Rule 21

Certiorari

Habeas Corpus Proceedings for Prisoners under Sentence of Death or Life Imprisonment. — By analogy, subdivision (b) of this Rule and § 7A-27(a), and repealed § 15-180.2 were logically applicable to petitions

for certiorari to review judgments in habeas corpus proceedings involving the restraint of prisoners under sentences of death or life imprisonment. *State v. Niccum*, 293 N.C. 276, 238 S.E.2d 141 (1977).

ARTICLE VI. GENERAL PROVISIONS

Rule 25

Dismissal for Failure to Comply with Rules

Editor's Note. — For note discussing abandonment of appeal, see 56 N.C.L. Rev. 573 (1978).

Rule 27

Computation and Extension of Time

(c) **Extensions of Time; by Which Court Granted.** Except as herein provided, courts for good cause shown may upon motion extend any of the times prescribed by these rules or by order of court for doing any act required or allowed under these rules; or may permit an act to be done after the expiration of such time. Courts may not extend the time for taking an appeal prescribed by these rules or by law.

A motion to extend the time for filing the record on appeal to a time greater than 150 days from the taking of appeal may only be made to the appellate court to which appeal has been taken. All other motions for extensions of time are made to the trial tribunal from whose judgment, order, or other determination the appeal has been taken during the time prior to docketing of the appeal in the appellate division. No extension of time shall be granted by the trial tribunal which, if fully used, would preclude filing the appeal within 150 days from the taking of the appeal. If the appellate division extends the 150-day filing period, any subsequent motion for any extension of time shall be made to the appellate court where the case is to be docketed. Motions made under this Rule 27 to a court of the trial divisions may be heard and determined by any of those judges of the particular court specified in Rule 36 of these rules. Such motions made to a commission may be heard and determined by the chairman of the commission; or, if to a commissioner, then by that commissioner.

Motions for extensions of time made to a trial tribunal may be made orally or in writing and without notice to other parties and may be determined at anytime or place within the state. Such motions may be determined *ex parte*, but the moving party shall promptly serve on all other parties to the appeal a copy of any order extending time.

Editor's Note. — The amendment adopted March 7, 1978, added the third and fourth sentences of the second paragraph of subsection (c).

As the rest of this rule was not changed by the amendment, only subsection (c) is set out.

Rule 28**Briefs; Function and Content**

Under this Rule, appellate review is limited, etc. —

This rule requires that a question be presented and argued in the brief in order to obtain appellate review. *Love v. Pressley*, 34 N.C. App. 503, 239 S.E.2d 574 (1977).

Applied in *State v. Roberts*, 293 N.C. 1, 235 S.E.2d 203 (1977); *State v. Witherspoon*, 293 N.C. 321, 237 S.E.2d 822 (1977); *State v. Jones*, 293 N.C. 413, 238 S.E.2d 482 (1977); *State v. Alston*, 293 N.C. 553, 238 S.E.2d 505 (1977); *State v. Lockett*, 33 N.C. App. 401, 235 S.E.2d 73 (1977); *State v. Tuttle*, 33 N.C. App. 465, 235 S.E.2d 412 (1977); *State v. Minshew*, 33 N.C. App. 593, 235 S.E.2d 866 (1977); *White v. Lawrence*, 33 N.C. App. 631, 236 S.E.2d 30 (1977); *Streeter v. Streeter*, 33 N.C. App. 679, 236 S.E.2d 185

(1977); *State v. Looney*, 294 N.C. 1, 240 S.E.2d 612 (1978); *State v. Martin*, 294 N.C. 253, 240 S.E.2d 415 (1978); *Burkheimer v. Coble*, 35 N.C. App. 127, 239 S.E.2d 852 (1978); *State v. Warren*, 35 N.C. App. 468, 241 S.E.2d 854 (1978).

Quoted in *Sutton v. Sutton*, 35 N.C. App. 670, 242 S.E.2d 644 (1978).

Cited in *State v. Willard*, 293 N.C. 394, 238 S.E.2d 509 (1977); *State v. Shaw*, 293 N.C. 616, 239 S.E.2d 439 (1977); *State v. Greene*, 34 N.C. App. 149, 237 S.E.2d 325 (1977); *State v. McWhorter*, 34 N.C. App. 462, 238 S.E.2d 639 (1977); *Murphy v. Murphy*, 34 N.C. App. 677, 239 S.E.2d 597 (1977); *State v. Thomas*, 35 N.C. App. 198, 241 S.E.2d 128 (1978); *Bridger v. Mangum*, 35 N.C. App. 569, 241 S.E.2d 726 (1978); *North Carolina Auto. Rate Administrative Office v. Ingram*, 35 N.C. App. 578, 242 S.E.2d 205 (1978).

Rule 30**Oral Argument****(e) Decision of Appeal Without Publication of an Opinion.**

(1) In order to minimize the cost of publication and of providing storage space for the published reports, the Court of Appeals is not required to publish an opinion on every decided case. If the panel which hears the case determines that the appeal involves no new legal principles and that an opinion, if published, would have no value as a precedent, it may direct that no opinion be published.

(2) Decisions without published opinion shall be reported only by listing the case and the decision in the Advance Sheets and the bound volumes of the Court of Appeals Reports.

Editor's Note. —

The amendment adopted Dec. 18, 1975, added subsection (e).

As the rest of this rule was not changed by the amendment, only subsection (e) is set out.

Rule 38**Substitution of Parties**

Cited in *Branch Banking & Trust Co., v. Gill*, 293 N.C. 164, 237 S.E.2d 21 (1977).

(5) GENERAL RULES OF PRACTICE FOR THE SUPERIOR AND DISTRICT COURTS

8. Discovery.

Cross Reference. — As to sequence and timing of discovery, see § 1A-1, Rule 26(d).

10. Opening and Concluding Arguments.

Quoted in State v. Baker, 34 N.C. App. 434, 238 S.E.2d 648 (1977).

16. Withdrawal of Appearance.

Attorney-Client Relationship Dissolved at Any Time. — As between the attorney and his client, the relationship may, in good faith, be dissolved at any time. High Point Bank & Trust Co. v. Morgan-Schultheiss, Inc., 33 N.C. App. 406, 235 S.E.2d 693, cert. denied, 293 N.C. 258, 237 S.E.2d 535 (1977).

But Withdrawal from Litigation Must Be Justified. — The attorney may not be released

from litigation in which he appears for the client without first satisfying the court that his withdrawal therefrom is justified, and whether he is justified will depend on the circumstances of that particular situation. High Point Bank & Trust Co. v. Morgan-Schultheiss, Inc., 33 N.C. App. 406, 235 S.E.2d 693, cert. denied, 293 N.C. 258, 237 S.E.2d 353 (1977).

Appendix II. Rules of Practice in United States District Courts

United States District Court for the Middle District of North Carolina

V. United States Magistrates

RULE

50. Authority of United States Magistrates

- (b) Orders by Magistrate; Nondispositive Pre-Trial Matters; Appeal.

V. United States Magistrates

Rule 50.

AUTHORITY OF UNITED STATES MAGISTRATES

(b) **Orders by Magistrate; Nondispositive Pre-Trial Matters; Appeal.**

- (1) In every case in which a United States magistrate issues a final order pursuant to the authority vested in him by virtue of 28 U.S.C. § 636(a)(1), any party shall have the right to appeal such order to a United States District Judge as provided herein unless

(A) The statute or rule granting authority to the United States magistrate to issue such order specifically provides a different procedure for review;

(B) Review of the order may ultimately be obtained in a trial of the action or in another proceeding. The appeal shall be effected in accordance with section (b)(3) of this rule.

Application for a stay of the order pending appeal must be made in the first instance to the magistrate.

- (2) In accordance with 28 U.S.C. § 636(b)(1)(A), a magistrate may hear and determine any pre-trial motion or other pre-trial matter, other than those motions specified in section (c) of this rule.

- (3) Any party may appeal from a magistrate's determination made under this section within ten (10) days after entry of the magistrate's order, unless a different time is prescribed by the magistrate or a judge. Such party shall file with the clerk of court, and serve on all parties, a written notice of appeal which shall specifically designate the order or part thereof appealed from and state concisely the basis for objection thereto. A judge of this court may reconsider the matters raised by the appeal and set aside any portion of the magistrate's order found to be clearly erroneous or contrary to law. The judge may also reconsider any matter sua sponte.

Editor's Note. —

The amendment adopted June 9, 1978, added subsection(1) of section (b) and redesignated former subsections (1) and (2) of section (b) as (2) and (3).

As the rest of this rule was not changed by the amendment, only section (b) is set out.

**The United States District Court for the Eastern District
of North Carolina**

Rules of Court

I. General Rules

RULE
20. [Forms.]

I. General Rules

Rule 20. [Forms.]

FORM 1: *INSTRUCTIONS FOR FILING A COMPLAINT BY A STATE PRISONER UNDER THE CIVIL RIGHTS ACT, 42 UNITED STATES CODE SECTION 1983.*

This packet contains four (4) copies of a complaint form and two (2) copies of a *forma pauperis* petition. To start an action you **MUST** file an original and one copy of your complaint for **EACH** defendant you name and one copy for the Court. For example, if you name two defendants you must file an original and three copies of the complaint. You should also keep an additional copy of the complaint for your own records. If you should name more than two defendants, additional copies of the complaint forms will be made available to you. *All copies of the complaint must be identical to the original.*

The Clerk will not file your complaint unless it conforms to these instructions and to these forms.

Your complaint must be legibly handwritten or typewritten. You, the plaintiff, must sign and declare under penalty of perjury that the facts are correct. If you need additional space to answer a question, you may use the reverse side of the form or an additional blank page.

Your complaint can be brought in this Court only if one or more of the named defendants is located within this District. Further, you must file a separate complaint for each claim that you have unless they are all related to the same incident or issue.

You are required to furnish, so that the United States Marshal can complete service, *the correct name and address of each person you have named as a defendant*. A PLAINTIFF IS REQUIRED TO GIVE INFORMATION TO THE UNITED STATES MARSHAL TO COMPLETE SERVICE OF THE COMPLAINT UPON ALL PERSONS NAMED AS DEFENDANTS.

In order for this complaint to be filed, it must be accompanied by the filing fee of 15 dollars (15.00). In addition, the United States Marshal will require you to pay the cost of serving the complaint upon each of the defendants.

If you are unable to pay the filing fee and service costs for this action, you may petition the Court to proceed *in forma pauperis*. One copy should be filed with your complaint; the other copy is for your records.

You will note that you are required to give facts. ***THIS COMPLAINT SHOULD NOT CONTAIN LEGAL ARGUMENTS OR CITATIONS.***

When these forms are completed, mail the original and the copies to the Clerk of the United States District Court for the Eastern District of North Carolina, Post Office Box 25670, Raleigh, North Carolina, 27611.

FORM 2: *FORM TO BE USED BY A PRISONER IN FILING A COMPLAINT UNDER THE CIVIL RIGHTS ACT, 42 U.S.C. 1983.*

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

No.-CRT
(leave this space blank)

.....
.....
(enter the full name of the
plaintiff or plaintiffs in
this action ABOVE)
versus

.....
.....
(enter the full name of the
defendant of defendants in
this action)

I. HAVE YOU BEGUN OTHER LAWSUITS IN FEDERAL COURT
DEALING WITH THE SAME FACTS INVOLVED IN THIS ACTION?
Yes () No ()
IF YOUR ANSWER IS YES, DESCRIBE THE FORMER LAWSUIT IN
THE SPACE PROVIDED BELOW:

II. PLACE OF PRESENT CONFINEMENT
(give name and address of place of current confinement)

III. PARTIES
(In Item "A" below, place your name in the first blank and place your
present address in the second blank. Do the same for additional plaintiffs,
if any.)
A. Name of Plaintiff
Address
(In Item "B" below, place the full name of the defendant in the first blank,
his official position in the second blank, and his place of employment in
the third blank. Use Item "C" for the names, positions, and places of
employment of any additional defendants.)
B. Defendant is employed as a
at
C. Additional Defendants

IV. STATEMENT OF CLAIM
(State here as briefly as possible the *FACTS* of your case. Describe how
each defendant is involved. Include also the names of other persons
involved, dates, and places. *DO NOT GIVE ANY LEGAL CITATIONS
OR ANY LEGAL ARGUMENTS OR CITE ANY STATUTES.* If you
intend to allege a number of related claims, number and set forth each
claim in a SEPARATE paragraph. Use as much space as you need.
Attach extra sheets if necessary.)
.....

.....
.....
.....
.....
.....
.....
.....

V. RELIEF SOUGHT BY PRISONER
(State briefly EXACTLY what you want the Court to do for you. MAKE NO LEGAL ARGUMENTS, DO NOT CITE CASES OR STATUTES.)

.....
.....
.....
.....
.....

Signed this day of, 19.
(Signature of the Plaintiff)
(other signatures of other plaintiffs
if necessary)

I declare under penalty of perjury that the foregoing is true and correct.

..... DATE (Signature of Plaintiff)
(signatures of other plaintiffs
if necessary)

FORM 3:

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

NO.-CRT

.....
(name of Plaintiff)
versus
(Name of defendant) }
DECLARATION IN SUPPORT OF
REQUEST TO PROCEED IN
FORM PAUPERIS
.....

I,, am the plaintiff in the above entitled case. In support of my motion to proceed without being required to prepay fees or costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or give security therefor; that I believe I am entitled to redress.

I declare that the responses which I have made below are true.

1. Are you presently employed? Yes. No.
A. If the answer is yes, state the amount of your salary per month and give the name of your employer, or the division in which you have employment . .
B. If the answer is no, state the date of your last employment and the amount of the salary per month which you received.
2. Have you received within the past twelve (12) months any money from any of the following sources?

- A. Business, profession, or form of self-employment:
Yes No
- B. Rent payments, interest, or dividends? Yes No
- C. Pensions, annuities, or life insurance payments:
Yes No
- D. Gifts or inheritances: Yes No
- E. Any other sources: Yes No

If the answer to any of the above is YES, describe each source of money and state the amount received from each during the past twelve (12) months. .
.....

FORM 4:

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

NO.....CRT

.....
Plaintiff
versus
.....
Defendant

}

ORDER

PLAINTIFF,, a prisoner at the, has submitted a complaint for filing in this District, together with a request for leave to proceed *in forma pauperis*. Since it appears that he is unable to pay the costs for commencement of suit, the following ORDER is entered this day of 19....:

IT IS HEREBY ORDERED that Plaintiff's MOTION to proceed *in forma pauperis* is GRANTED and the Clerk is directed to file the Complaint.

3. Do you own cash or do you have money in a checking or savings account?
Yes No (Include any funds in prison accounts, if any)
If the answer is YES, state the total value owned.
.....
Include with this petition, attached to this form, a statement of the balance of your prison trust account balance.
4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?
Yes No
If the answer is YES, describe the property and state its approximate value.
.....
5. List the persons who are dependent upon you for support; state your relationship to those persons; and indicate how much you contribute toward their support.
.....
.....

I UNDERSTAND THAT A FALSE STATEMENT OR ANSWER TO ANY QUESTIONS IN THIS DECLARATION WILL SUBJECT ME TO PENALTIES FOR PERJURY.

.....
(Signature of Plaintiff)

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

Signed this day of, 19. . . .

.....
(Signature of Plaintiff)

IT IS FURTHER ORDERED that Plaintiff shall serve upon defendant or, if appearance is entered by counsel for defendant, upon his attorney, a copy of every further pleading or other document for consideration by the Court. He shall include with the original paper to be filed with the Clerk of Court a certificate stating the date a true and correct copy of any document was mailed to the defendant or his counsel. Any paper received by a District Judge or Magistrate which has not been filed with the Clerk or which fails to include a certificate of service will be DISREGARDED BY THIS COURT.

UNITED STATES DISTRICT JUDGE
or
UNITED STATES MAGISTRATE

FORM 5:

.....
(date)

Mr.
(name of plaintiff)

.....
(address of plaintiff)

Dear Mr.:

Judge (Magistrate) received your communication of
....., 19..... However, it is improper for you to communicate directly with judges or magistrates about cases pending before them. Accordingly, your communication is returned herewith.

When you wish to provide information relevant to your case, you MUST mail the paper to the Clerk of Court, *Post Office Box 25670, Raleigh, North Carolina, 27611*, who will then forward it to the appropriate Judge or Magistrate.

You must also mail a copy of the paper to each defendant or, if they are represented by counsel, to their attorneys, and include on the original paper filed with the Clerk of Court a certificate stating the date on which you mailed a true and correct copy to each defendant or his attorney.

Very Truly Yours,
Clerk of Court

by:

Editor's Note. — This rule was adopted by order dated Jan. 11, 1978.

The order adding this rule provides: "... that the Clerk shall implement these additions to the Local General Rules of the United States

District Court for the Eastern District of North Carolina in such a manner as will result in a speedy transition to full utilization of this forms system; said transition is to be fully completed by June 1, 1978."

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ARTICLE VI

Meetings of the Council.

§ 5. Standing Committees of the Council. —

c. Committee on Grievances. —

Grievance Committee of not less than fifteen members, one of whom shall be designated as Chairman and one as Vice-Chairman. The Committee shall have as members at least three councillors from districts in each of the court divisions of the State. The Grievance Committee shall have the powers and duties set forth in Article IX of these rules, and shall report on the status of grievances, investigations and complaints at regular or special meetings of the Council as the Executive Committee may direct.

e. Committee on Unauthorized Practice of not less than three Councillors selected by the President.

§ 1. General Provisions.

The purpose for establishing a committee on the unauthorized practice of law and the reasons for the prohibition against the practice of law by those who have not been examined, found qualified to practice law and licensed to practice law is to protect the public from being advised and represented in legal matters by unqualified persons over whom the judicial department can exercise little, if any,

control in the matter of infractions of the Code of Professional Responsibility which in the public interest, lawyers are bound to observe.

§ 2. Proceeding for Prohibition of Unauthorized Practice of Law.

The procedure to prevent and restrain the unauthorized practice of law shall be in accordance with the provisions hereinafter set forth.

District Bars shall not conduct separate proceedings into unauthorized practice of law matters, but shall assist and cooperate with The North Carolina State Bar in reporting and investigating matters of alleged unauthorized practice of law.

§ 3. Definitions.

Subject to additional definitions contained in other provisions of this chapter, the following words and phrases, when used in this article, shall have, unless the context clearly indicates otherwise, the meanings given to them in this section:

- (1) Appellate Division: The Appellate Division of the General Court of Justice.
- (2) Chairman of the Unauthorized Practice of Law Committee: councillor appointed to serve as chairman of the Unauthorized Practice of Law Committee of The North Carolina State Bar.
- (3) Complainant or Complaining Witness: any person who has complained of the conduct of any person, firm or corporation as relates to alleged unauthorized practice of law.
- (4) Complaint: a formal pleading filed in the name of The North Carolina State Bar in the Superior Court against a person, firm or corporation after a finding of probable cause.
- (5) Council: The Council of The North Carolina State Bar.
- (6) Councillor: a member of The Council of The North Carolina State Bar.
- (7) Counsel: the Counsel of The North Carolina State Bar Appointed by the Council.
- (8) Court or Courts of this State: a court authorized and established by the Constitution or laws of the State of North Carolina.
- (9) Defendant: any person, firm or corporation against whom a complaint is filed after a finding of probable cause.
- (10) Unauthorized Practice of Law Committee: the Unauthorized Practice of Law Committee of The North Carolina State Bar.
- (11) Investigation: the gathering of information with respect to alleged unauthorized practice of law.
- (12) Investigator: any person designated to assist in investigation of alleged unauthorized practice of law.
- (13) Letter of Caution: communication from the Unauthorized Practice of Law Committee to any person stating that past conduct of the person, while not the basis for formal action, is questionable as relates to the practice of law or may be the basis for injunctive relief if continued or repeated.
- (14) Letter of Notice: a communication to an accused individual or corporation setting forth the substance of the alleged conduct involving unauthorized practice of law.
- (15) Office of the Counsel: the office and staff maintained by the Counsel of The North Carolina State Bar.
- (16) Office of the Secretary: the office and staff maintained by the Secretary-Treasurer of The North Carolina State Bar.
- (17) Party: after a complaint has been filed, the North Carolina State Bar as plaintiff and the accused individual or corporation as defendant.
- (18) Plaintiff: after a complaint has been filed, The North Carolina State Bar.
- (19) Preliminary Hearing: hearing by the Unauthorized Practice of Law Committee to determine whether probable cause exists.

(20) Probable Cause: a finding by the Unauthorized Practice of Law Committee that there is reasonable cause to believe that a person or corporation is guilty of unauthorized practice of law justifying legal action against such person or corporation.

(21) Secretary: the Secretary-Treasurer of The North Carolina State Bar.

(22) Supreme Court: the Supreme Court of North Carolina.

§ 4. State Bar Council — Powers and Duties in Discipline and Disability Matters.

The Council of The North Carolina State Bar shall have the power and duty:

(1) To supervise the administration of Unauthorized Practice of Law Committee in accordance with the provisions hereinafter set forth.

(2) To appoint a Counsel. The Counsel shall serve at the pleasure of the Council. The Counsel shall be a member of The North Carolina State Bar but shall not be permitted to engage in the private practice of law.

§ 5. Chairman of the Unauthorized Practice of Law Committee — Powers and Duties.

(A) The Chairman of the Unauthorized Practice of Law Committee shall have the power and duty:

(1) To supervise the activities of the Counsel.

(2) To recommend to the Unauthorized Practice of Law Committee that an investigation be initiated.

(3) To recommend to the Unauthorized Practice of Law Committee that a complaint be dismissed.

(4) To direct a Letter of Notice to accused person or corporation.

(5) To notify an accused and any complainant that a complaint has been dismissed.

(6) To call meetings of the Unauthorized Practice of Law Committee for the purpose of holding preliminary hearings.

(7) To issue subpoenas in the name of The North Carolina State Bar or direct the Secretary to issue such subpoenas.

(8) To administer oaths or affirmations to witnesses.

(9) To file and verify complaints and petitions in the name of The North Carolina State Bar.

(B) The President, Vice-Chairman or senior Council member of the Unauthorized Practice of Law Committee shall perform the functions of the Chairman of the Unauthorized Practice of Law Committee in any matter when the Chairman is absent or disqualified.

§ 6. Unauthorized Practice of Law Committee — Powers and Duties.

The Unauthorized Practice of Law Committee shall have the power and duty:

(1) To direct the Counsel to investigate any alleged unauthorized practice of law by any person, firm or corporation in the State of North Carolina.

(2) To hold preliminary hearings, find probable cause and direct the complaints be filed.

(3) To dismiss complaints upon a finding of no probable cause.

(4) To issue a Letter of Caution to an accused in cases wherein unauthorized practice of law is not established but the activities of the accused are deemed to be improper or may become the basis for unauthorized practice of law if continued or repeated.

§ 7. Counsel — Powers and Duties.

The Counsel shall have the power and duty:

(1) To investigate all matters involving alleged unauthorized practice of law whether initiated by the filing of complaint or otherwise.

(2) To recommend to the Chairman of the Unauthorized Practice of Law Committee that a matter be dismissed because the complaint is frivolous or falls outside the Council's jurisdiction; that a Letter of Notice be issued; or that the matter be passed upon by the Unauthorized Practice of Law Committee to determine whether probable cause exists.

(3) To prosecute all unauthorized practice of law proceedings before the Unauthorized Practice of Law Committee and the courts.

(4) To represent The North Carolina State Bar in any trial or other proceedings concerned with the alleged unauthorized practice of law.

(5) To appear on behalf of The North Carolina State Bar at hearings conducted by the Unauthorized Practice of Law Committee or any other agency or court concerning any motion or other matter arising out of an unauthorized practice of law proceeding.

(6) To employ assistant counsel, investigators, and other administrative personnel in such numbers as the Council may from time to time authorize.

(7) To maintain permanent records of all matters processed and the disposition of such matters.

(8) To perform such other duties as the Council may from time to time direct.

§ 8. Secretary — Powers and Duties in Unauthorized Practice of Law Matters.

The Secretary shall have the following powers and duties in regard to discipline and disability procedures:

(1) To receive complaints for transmittal to the Counsel.

(2) To issue summons and subpoenas when so directed by the President or the Chairman of the Unauthorized Practice of Law Committee.

(3) To maintain a record and file of all complaints not dismissed as frivolous or determined to be outside the jurisdiction of The North Carolina State Bar by the Unauthorized Practice of Law Committee.

§ 9. Investigation; Initial Determination.

(1) Subject to the policy supervision of the Council and the control of the Chairman of the Unauthorized Practice of Law Committee, the Counsel, or other personnel under the authority of the Counsel, shall make such investigation of the complaint as may be appropriate and submit to the Chairman of the Unauthorized Practice of Law Committee a report detailing the findings of the investigation.

(2) The Chairman of the Unauthorized Practice of Law Committee may: (1) treat the report as a final report and advise the Counsel to discontinue investigation; (2) direct the Counsel to conduct further investigation, including contact with the accused in writing or otherwise; or (3) send a Letter of Notice to the accused party.

(3) If a Letter of Notice is sent to the accused individual or corporation, it shall be by registered mail and shall direct that a response be made within fifteen (15) days of receipt of the Letter of Notice.

(4) If a timely response to a Letter of Notice is made, the Chairman shall direct the Counsel to conduct further investigation or to terminate the investigation and place the item on the agenda for the next forthcoming Unauthorized Practice of Law Committee meeting.

(5) If, after the expiration of fifteen (15) days from the date of the receipt of the Letter of Notice, the individual or corporation has failed or refused to respond or has given a response that is insufficient to resolve the matter, the Chairman may direct Counsel to proceed to seek injunctive relief to enjoin such unauthorized practice pursuant to G.S. 84-37 or direct Counsel to notify the District Attorney of the Judicial District wherein the accused individual or

corporation resides to bring injunctive or criminal proceedings against that individual or corporation pursuant to G.S. 84-7 et seq.

§ 10. Preliminary Hearing.

At the regular quarterly meeting of the Unauthorized Practice of Law Committee, the Committee shall consider all matters presented to it by Counsel and shall determine whether or not probable cause exists in each matter tending to establish that a person, firm or corporation is engaged in the unauthorized practice of law in North Carolina.

If no probable cause is found, the Committee shall recommend to the Council that the matter be dismissed. If probable cause is found the Committee shall then recommend to the Council that the matter be prosecuted in the General Court of Justice as by law provided.

Editor's Note. — The amendments approved by the Supreme Court Nov. 4, 1975 and Feb. 3, 1976, rewrote paragraph c of § 5.

The amendment approved by the Supreme Court Feb. 24, 1978, rewrote paragraph e of § 5.

As the rest of this article was not changed by the amendments, only paragraphs c and e of § 5 are set out.

ARTICLE IX.

Discipline and Disbarment of Attorneys.

Determination of Disability.

§ 1. General Provisions.

Discipline for misconduct is not intended as punishment for wrongdoing but is for the protection of the public, the courts and the legal profession. The fact that certain misconduct has remained unchallenged when done by others, when done at other times or that it has not been made the subject of disciplinary proceedings earlier, shall not be an excuse for any member of the Bar.

§ 2. Proceeding for Discipline.

The procedure to discipline members of the Bar of this State shall be in accordance with the provisions hereinafter set forth.

District Bars shall not conduct separate proceedings to discipline members of the Bar but shall assist and cooperate with The North Carolina State Bar in reporting and investigating matters of alleged misconduct on the part of the members of The North Carolina State Bar.

§ 3. Definitions.

Subject to additional definitions contained in other provisions of this chapter, the following words and phrases, when used in this article, shall have, unless the context clearly indicates otherwise, the meanings given to them in this section:

(1) **Accused or Accused Attorney:** a member of The North Carolina State Bar who has been accused of misconduct or whose conduct is under investigation, but as to which conduct there has not yet been a determination of whether probable cause exists.

(2) **Appellate Division:** The Appellate Division of the General Court of Justice.

(3) **Certificate of Conviction:** the certified copy of any judgment wherein a member of The North Carolina State Bar is convicted of a criminal offense, forwarded to the Secretary-Treasurer by the clerk of any state or federal court.

(4) **Chairman of the Grievance Committee:** councilor appointed to serve as chairman of the Grievance Committee of The North Carolina State Bar.

(5) **Commission:** The Disciplinary Hearing Commission of The North Carolina State Bar.

(6) **Commission Chairman:** the Chairman of the Hearing Commission of The North Carolina State Bar.

(7) **Complainant or Complaining Witness:** any person who has complained of the conduct of any member of The North Carolina State Bar to any officer or agency of The North Carolina State Bar.

(8) **Complaint:** a formal pleading filed in the name of The North Carolina State Bar with the Commission Chairman against a member of The North Carolina State Bar after a finding of probable cause.

(9) **Council:** the Council of The North Carolina State Bar.

(10) **Councilor:** a member of The Council of The North Carolina State Bar.

(11) **Counsel:** the Counsel of The North Carolina State Bar appointed by the Council.

(12) **Court or Courts of This State:** a court authorized and established by the Constitution or laws of the State of North Carolina.

(13) **Defendant:** a member of The North Carolina State Bar against whom a complaint is filed after a finding of probable cause.

(14) **Disabled or Disability:** condition of mental or physical incapacity interfering with the professional judgment or competence of an attorney; habitual intemperance; or the wilful and persistent failure to perform professional duties.

(15) **Grievance:** alleged misconduct.

(16) **Grievance Committee:** the Grievance Committee of The North Carolina State Bar.

(17) **Hearing Committee:** a hearing committee designated under § 14(4).

(18) **Incapacity or Incapacitated:** condition determined in a judicial proceeding under the laws of this or any other jurisdiction that an attorney is mentally defective, an inebriate, mentally disordered, or incompetent from want of understanding to manage his or her own affairs by reason of the excessive use of intoxicants, drugs, or other cause.

(19) **Investigation:** the gathering of information with respect to alleged misconduct or disability or to reinstatement.

(20) **Investigator:** any person designated to assist in investigation of alleged misconduct or of reinstatement.

(21) **Letter of Caution:** communication from the Grievance Committee to an attorney stating that past conduct of the attorney, while not the basis for discipline, is not professionally acceptable or may be the basis for discipline if continued or repeated.

(22) **Letter of Notice:** a communication to an accused attorney setting forth the substance of a grievance.

(23) **Office of the Counsel:** the office and staff maintained by the Counsel of The North Carolina State Bar.

(24) **Office of the Secretary:** the office and staff maintained by the Secretary-Treasurer of The North Carolina State Bar.

(25) **Party:** after a complaint has been filed, The North Carolina State Bar as plaintiff and the accused attorney as defendant.

(26) **Plaintiff:** after a complaint has been filed, The North Carolina State Bar.

(27) **Preliminary Hearing:** hearing by the Grievance Committee to determine whether probable cause exists.

(28) **Probable Cause:** a finding by the Grievance Committee that there is reasonable cause to believe that a member of The North Carolina State Bar is guilty of misconduct justifying disciplinary action.

(29) **Secretary:** the Secretary-Treasurer of The North Carolina State Bar.

(30) **Serious Crime:** the commission of, attempt to commit, conspiracy to commit, solicitation or subornation of, any felony, or any crime that involves bribery, embezzlement, false pretenses and cheats, fraud, interference with the judicial or political process, larceny, misappropriation of funds or property, overthrow of the government, perjury or wilful failure to file a tax return.

(31) **Supreme Court:** the Supreme Court of North Carolina.

(32) **Consolidation of Cases:** a hearing by a Hearing Committee of multiple charges, whether related or unrelated in substance, brought against one defendant.

§ 4. State Bar Council — Powers and Duties in Discipline and Disability Matters.

The Council of The North Carolina State Bar shall have the power and duty:

(1) To supervise and conduct discipline and incapacity or disability proceedings in accordance with the provisions hereinafter set forth.

(2) To appoint members of the Disciplinary Hearing Commission as provided by statute.

(3) To appoint a Counsel. The Counsel shall serve at the pleasure of the Council. The Counsel shall be a member of The North Carolina State Bar but shall not be permitted to engage in the private practice of law.

(4) To order the transfer of a member to inactive status when such member has been judicially declared incompetent or has been committed to institutional care voluntarily or involuntarily because of incompetence or disability.

(5) To accept the surrender of the license to practice law of any member of The North Carolina State Bar during the progress of disciplinary proceedings against the member and impose such conditions upon the acceptance as the Council deems appropriate.

(6) To review the report of any Hearing Committee upon a petition for reinstatement and make the final determination as to whether the license shall be restored.

§ 5. Chairman of the Grievance Committee — Powers and Duties.

(A) The Chairman of the Grievance Committee shall have the power and duty:

(1) To supervise the activities of the Counsel.

(2) To recommend to the Grievance Committee that an investigation be initiated.

(3) To recommend to the Grievance Committee that a grievance be dismissed.

(4) To direct a Letter of Notice to an accused attorney.

(5) To issue, at the direction and in the name of the Grievance Committee, Letters of Caution or private reprimands to an accused attorney.

(6) To notify an accused attorney that a grievance has been dismissed, and to notify the complainant in accordance with § 21.

(7) To call meetings of the Grievance Committee for the purpose of holding preliminary hearings.

(8) To issue subpoenas in the name of The North Carolina State Bar or direct the Secretary to issue such subpoenas.

(9) To administer oaths or affirmations to witnesses.

(10) To file and verify complaints and petitions in the name of The North Carolina State Bar.

(B) The President, Vice-Chairman or senior Council member of the Grievance Committee shall perform the functions of the Chairman of the Grievance Committee in any matter when the Chairman is absent or disqualified.

§ 6. Grievance Committee — Powers and Duties.

The Grievance Committee shall have the power and duty:

(1) To direct the Council to investigate any alleged misconduct or disability of a member of The North Carolina State Bar coming to its attention.

(2) To hold preliminary hearings, find probable cause and direct that complaints be filed.

(3) To dismiss grievances upon a finding of no probable cause.

(4) To issue a Letter of Caution to an accused attorney in cases wherein misconduct is not established but the activities of the accused attorney are deemed to be improper or may become the basis for discipline if continued or repeated.

(5) To issue a private reprimand to an accused attorney in cases wherein minor misconduct is established.

(6) To direct that petitions be filed seeking a determination whether a member of The North Carolina State Bar is disabled from continuing the practice of law by reason of mental infirmity or illness or because of addiction to drugs or intoxicants.

§ 7. Counsel — Powers and Duties.

The Counsel shall have the power and duty:

(1) To investigate all matters involving alleged misconduct whether initiated by the filing of grievance or otherwise.

(2) To recommend to the Chairman of the Grievance Committee that a matter be dismissed because the grievance is frivolous or falls outside the Council's jurisdiction; that a Letter of Caution or private reprimand be issued; or that the matter be passed upon the Grievance Committee to determine whether probable cause exists.

(3) To prosecute all disciplinary proceedings before the Grievance Committee, Hearing Committees and the courts.

(4) To represent The North Carolina State Bar in any trial, hearing or other proceeding concerned with the alleged disability of a member due to mental infirmity, illness, or addiction to drugs or intoxicants.

(5) To appear on behalf of The North Carolina State Bar at hearings conducted by Grievance Committee, Hearing Committees, or any other agency or court concerning any motion or other matter arising out of a disciplinary or disability proceeding.

(6) To appear at hearings conducted with respect to petitions for reinstatement or restoration of license by suspended or disbarred attorneys, to cross-examine witnesses testifying in support of the petition and to present evidence, if any, in opposition to the petition.

(7) To employ assistant counsel, investigators and other administrative personnel in such numbers as the Council may from time to time authorize.

(8) To maintain permanent records of all matters processed and the disposition of such matters.

(9) To perform such other duties as the Council may from time to time direct.

§ 8. Chairman of the Hearing Commission — Powers and Duties.

(A) The Chairman of the Disciplinary Hearing Commission of The North Carolina State Bar shall have the power and duty:

(1) To receive complaints alleging misconduct and petitions alleging the disability of a member filed by the Grievance Committee and petitions requesting reinstatement or restoration of license by members of The North Carolina State Bar who have been involuntarily transferred to inactive status, suspended or disbarred.

(2) To assign three members of the Commission, consisting of two members of The North Carolina State Bar and one layman, to hear such complaint or petition. The Chairman shall designate one of the attorney members as chairman of the Hearing Committee. Provided: that no member shall be appointed to serve

on any committee reviewing a petition for reinstatement in a case wherein that member served on the Hearing Committee that originally ordered the discipline or transfer to inactive status. The Chairman of the Hearing Commission may designate himself to serve as one of the attorney members of any Hearing Committee and shall be chairman of any Hearing Committee on which he serves.

(3) To set the time and place for the hearing on each complaint or petition.

(4) To subpoena witnesses and compel their attendance, and to compel the production of books, papers, and other documents deemed necessary or material to any hearing. The Chairman may designate the Secretary to issue such subpoenas.

(5) To file findings, conclusions and orders of the Hearing Committees with the Secretary.

(6) In his discretion to consolidate for hearing two or more cases in which a subsequent complaint or complaints have been served upon a defendant within ninety days of the date of service of the first or a preceding complaint.

(7) To prepare and issue letters of private reprimand.

(B) The Vice-Chairman of the Disciplinary Hearing Commission shall perform the function of the Chairman in any matter when the Chairman is absent or disqualified.

§ 9. Hearing Committee — Powers and Duties.

Hearing Committees of the Disciplinary Hearing Commission of The North Carolina State Bar shall have the following powers and duties:

(1) To hold hearings on complaints alleging misconduct and petitions seeking a determination of disability or reinstatement.

(2) To enter orders regarding discovery and other procedures in connection with such hearings, including, in disability matters, the examination of a member by such qualified medical experts as the Committee shall designate.

(3) To subpoena witnesses and compel their attendance, and to compel the production of books, papers and other documents deemed necessary or material to any hearing. Subpoenas shall be issued by the chairman of the Hearing Committee in the name of the Disciplinary Hearing Commission of The North Carolina State Bar. The chairman may direct the Secretary to issue such subpoenas.

(4) To administer oaths or affirmations to witnesses at hearings.

(5) To make findings of fact and conclusions of law.

(6) To enter orders dismissing complaints in matters before the Committee.

(7) To enter orders of discipline against attorneys in matters before the Committee.

(8) To tax costs of the disciplinary procedures against any defendant against whom discipline is imposed: Provided, however, that such costs shall not include the compensation of any member of the Council, committees or agencies of The North Carolina State Bar.

(9) To enter orders transferring a member to inactive status on the ground of incapacity or disability to continue the practice of law.

(10) To report to the Council its findings of fact and recommendations after hearings on petitions for reinstatement or restoration of license by members previously transferred to inactive status by a Hearing Committee or the Council, suspended, or disbarred.

§ 10. Secretary — Powers and Duties in Discipline and Disability Matters.

The Secretary shall have the following powers and duties in regard to discipline and disability procedures:

(1) To receive complaints for transmittal to the Council.

(2) To issue summons and subpoenas when so directed by the President, the Chairman of the Grievance Committee, the Chairman of the Disciplinary Hearing Commission, or the Chairman of any Hearing Committee.

(3) To maintain a record and file of all grievances not dismissed as frivolous or determined to be outside the jurisdiction of The North Carolina State Bar by the Grievance Committee.

§ 11. Grievances — Form and Filing.

(1) A grievance may be filed by any person against a member of The North Carolina State Bar. Such grievance may be written or oral, verified or unverified, and may be made initially to the Counsel. The Counsel may require that a grievance be reduced to writing in affidavit form and may prepare and distribute standard forms for this purpose. Such standard forms shall be available in the Office of the Counsel, the Office of the Secretary, and the offices of the several clerks of court in this State. Grievances reduced to writing on such standard form shall be transmitted by the complainant to the Office of the Secretary.

(2) Upon the direction of the Council or the Grievance Committee the Counsel shall undertake the investigation of such conduct of any member of The North Carolina State Bar as may be specified by the Council or Grievance Committee.

(3) The Counsel may undertake an investigation of any matter coming to the attention of the Counsel involving alleged misconduct of a member of The North Carolina State Bar: Provided that such investigation has been authorized by the Chairman of the Grievance Committee.

§ 12. Investigation; Initial Determination.

(1) Subject to the policy supervision of the Council and the control of the Chairman of the Grievance Committee, the Counsel, or other personnel under the authority of the Counsel, shall make such investigation of the grievance as may be appropriate and submit to the Chairman of the Grievance Committee a report detailing the findings of the investigation.

(2) Within fifteen days of the receipt of the initial or any interim report of the Counsel concerning any grievance, the Chairman of the Grievance Committee may: (1) treat the report as a final report and advise the Counsel to discontinue investigation; (2) direct the Counsel to conduct further investigation, including contact with the accused attorney in writing or otherwise; or (3) send a Letter of Notice to the accused attorney.

(3) If a Letter of Notice is sent to the accused attorney, it shall be by registered mail and shall direct that a response be made within fifteen days of receipt of the Letter of Notice. Such response shall be in a full and fair disclosure of all the facts and circumstances pertaining to the alleged misconduct.

(4) If a timely response to a Letter of Notice is made, the Chairman of the Grievance Committee shall direct the Counsel to conduct further investigation or shall terminate the investigation and so inform the Counsel.

(5) If, after the expiration of fifteen days from the date of receipt of a Letter of Notice, the accused attorney has failed or refused to respond or has given a response that is insufficient to resolve the grievance, the Chairman of the Grievance Committee may examine witnesses, including the accused, under oath and issue subpoenas to compel their attendance, and compel the production of books, papers, and other documents or writings deemed necessary or material to the inquiry. Each subpoena shall be issued by the Chairman of the Grievance Committee, or by the Secretary at the direction of the Chairman. The Counsel may examine such witnesses under oath or otherwise.

(6) Within forty-five days of the receipt of the final report of the Counsel, or the termination of an investigation, the Chairman shall convene the Grievance Committee for a preliminary hearing or seek approval of the Committee of the dismissal of the grievance.

(7) Neither the unwillingness nor neglect of the complainant to sign a grievance, nor settlement, compromise or restitution shall, in itself, justify abatement of an investigation into the conduct of an attorney.

§ 13. Preliminary Hearing.

(1) The Grievance Committee shall determine whether there is probable cause to believe that a member of The North Carolina State Bar is guilty of misconduct justifying disciplinary action.

(2) The Chairman of the Grievance Committee shall have the power to administer oaths and affirmations.

(3) The Chairman shall keep a record of the number of members concurring in the finding of every grievance and shall file the record with the Secretary, but the record shall not be made public except on order of the Council.

(4) The Chairman shall have the power to subpoena witnesses and compel their attendance, and compel the production of books, papers, and other documents deemed necessary or material to any preliminary hearing. The Chairman may designate the Secretary to issue such subpoenas.

(5) The Counsel, and assistant counsel, the witness under examination, interpreters when needed, and, if deemed necessary, a stenographer or operator of a recording device may be present while the Committee is in session, and deliberating, but no persons other than members may be present while the Committee is voting.

(6) Disclosure of matters occurring before the Committee other than its deliberations and the vote of any member may be made to the Counsel or the Secretary for use in the performance of their duties. Otherwise a member, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the Committee only when so directed by a court of record preliminarily to or in connection with a judicial proceeding.

(7) At any preliminary hearing held by the Grievance Committee, a quorum of two thirds of the members shall be required to conduct any business. Affirmative vote of a majority of members present shall be necessary for a finding that probable cause exists. The Chairman shall not be counted for quorum purposes and shall be eligible to vote regarding the disposition of any grievance only in case of a tie among the regular voting members.

(8) If probable cause is found, the Chairman shall direct the Counsel to prepare and file a complaint against the accused attorney. If no probable cause is found the grievance shall be dismissed.

(9) If no probable cause is found but it is determined by the Grievance Committee that the conduct of the accused attorney is not in accord with accepted professional practice, or may be the subject of discipline if continued or repeated, the Committee may issue a Letter of Caution to the accused attorney. A record of such Letter of Caution shall be maintained in the Office of the Secretary.

(10) If probable cause is found but it is determined by the Grievance Committee that a complaint and hearing are not warranted, the Committee may issue a private reprimand to the accused attorney. A record of such private reprimand shall be maintained in the Office of the Secretary, and a copy of the private reprimand shall be served upon the accused attorney as provided in G.S. 1A-1, Rule 4. Within fifteen days after service the accused attorney may refuse the private reprimand and request that charges be filed. Such refusal and request shall be addressed to the Grievance Committee and filed with the Secretary. The Counsel shall thereafter prepare and file a complaint against the accused attorney.

(11) Formal complaints shall be issued in the name of The North Carolina State Bar as plaintiff, signed or verified by the Chairman of the Grievance Committee.

§ 14. Formal Hearing.

(1) Complaints shall be filed in the Office of the Secretary. The Secretary shall cause a summons and a copy of the complaint to be served upon the defendant attorney and thereafter a copy of the complaint shall be delivered to the Chairman of the Disciplinary Hearing Commission, informing the Chairman of the date service on the defendant was effected.

(2) Service of complaints and other documents or papers shall be accomplished as set forth in G.S. 1A-1, Rule 4.

(3) Complaints in disciplinary actions shall set forth the charges with sufficient precision to clearly apprise the defendant attorney of the conduct which is the subject of the complaint.

(4) Within seven days of return of service of a complaint, the Chairman of the Disciplinary Hearing Commission shall designate a Hearing Committee from among the members of the Commission. The Chairman shall notify the Counsel and the defendant of the composition of the Hearing Committee. Such notice shall also contain the time and place determined by the Chairman for the hearing to commence. The commencement of the hearing shall be scheduled not less than sixty nor more than ninety days from the date of service of the complaint upon the defendant.

(5) Within twenty days after the service of the complaint, unless further time is allowed by the Chairman upon good cause shown, the defendant shall file an answer to the complaint with the Secretary and shall deliver a copy to the Counsel.

(6) Failure to file an answer admitting, denying or explaining the complaint, or asserting the grounds for failing to do so, within the time limited or extended, shall be grounds for entry of the defendant's default and in such case the allegations contained in the complaint shall be deemed to be admitted. The Hearing Committee shall thereupon enter an order, make findings of fact and conclusions of law based on the admissions, and order the discipline deemed appropriate.

(7) Discovery shall be available to the parties in accordance with the North Carolina Rules of Civil Procedure, G.S. 1A-1, Rules 26-37. Any discovery undertaken must be completed before the date scheduled for commencement of the hearing unless the time for discovery is extended, for good cause shown, by the Chairman. The Chairman may thereupon reset the time for the hearing to commence to accommodate completion of reasonable discovery.

(8) In order to provide opportunity for the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment, for settlement of a proceeding, or any of the issues therein, or consideration of means by which the conduct of the hearing may be facilitated and the disposition of the proceeding expedited, conferences between the parties for such purposes may be held at any time prior to or during hearings as time, the nature of the proceeding, and the public interest may permit. Any settlement or compromise of any issue in the case shall be subject to the approval of the Hearing Committee.

(9) At the discretion of the Chairman of the Hearing Committee a conference may be ordered prior to the date set for commencement of the hearing, and upon five days' notice to the parties, for the purpose of obtaining admissions or otherwise narrowing the issues presented by the pleadings. Such conference may be held before any member of the Committee designated by its Chairman. At any prehearing or other conferences which may be held to expedite the orderly conduct and disposition of any hearing, there may be considered, in

addition to any offers of settlement or proposals of adjustment, the possibility of the following:

- (a) The simplification of the issues.
- (b) The exchange and acceptance of service of exhibits proposed to be offered in evidence.
- (c) The obtaining of admission as to, or stipulations of, facts not remaining in dispute, or the authenticity of documents which might properly shorten the hearing.
- (d) The limitation of the number of witnesses.
- (e) The discovery of production of data.
- (f) Such other matters as may properly be dealt with to aid in expediting the orderly conduct and disposition of the proceeding.

(9.1) The Chairman of the Hearing Committee may hear and dispose of all pretrial motions excepting only motions the granting of which would result in continuance or dismissal of the charges or final judgment for either party.

(10) The initial hearing date as set by the Chairman in accordance with subsection (4) of this section may be reset by the Chairman pursuant to subsections (5) and (7) of this section, and said initial hearing or reset hearing may be continued by the Hearing Committee for a period not to exceed thirty days, for good cause shown.

(11) Unless necessary to afford the accused due process, no more than one continuance of a hearing and no more than one extension of time for filing of pleadings shall be granted. No continuance of any hearing other than adjournment from day to day shall be granted by a Hearing Committee after the hearing has commenced, except for reasons that would work an extreme hardship in the absence of a continuance; provided further the Chairman of the Disciplinary Hearing Commission may continue a hearing on his own motion, or by motion of either party, in order to await the filing of a controlling decision of an appellate court.

(12) The defendant shall appear in person before the Hearing Committee at the time and place named by the Chairman. The hearing shall be open except that for good cause shown the Chairman of the Hearing Committee may exclude from the hearing room all persons except the parties, Counsel, and those engaged in the hearing. No hearing shall be closed to the public over the objection of the defendant. The defendant shall, except as otherwise provided by law, be competent and compellable to give evidence in behalf of either of the parties. The defendant may be represented by Counsel, who shall enter an appearance. Pleadings and proceedings before a Hearing Committee shall conform as nearly as is practicable with requirements of the Rules of Civil Procedure and for trials of non-jury civil causes in the Superior Courts except as otherwise provided hereunder.

(13) Pleadings or other documents in formal proceedings required or permitted to be filed under these rules must be received for filing at the Office of the Secretary within the time limits, if any, for such filing. The date of receipt by the Office of the Secretary and not the date of deposit in the mails is determinative.

(14) When a defendant appears in his own behalf in a hearing he shall file with the Office of the Secretary, with proof of delivery of a copy to the Counsel, an address at which any notice or other written communication required to be served upon him may be sent, if such address differs from that last reported to the Secretary by the defendant.

(15) When a defendant is represented by Counsel in a hearing, Counsel shall file with the Office of the Secretary, with proof of delivery of a copy to the Counsel, a written notice of such appearance which shall state his name, address and telephone number, the name and address of the defendant on whose behalf he appears, and the caption and docket number of the proceeding. Any additional

notice or other written communication required to be served on or furnished to a defendant during the pendency of the hearing may be sent to the Counsel of record for such defendant at the stated address of the Counsel in lieu of transmission to the defendant.

(16) The Hearing Committee shall have the power to subpoena witnesses and compel their attendance, and to compel the production of books, papers and other documents deemed necessary or material to any hearing. Such process shall be issued in the name of the Committee by its Chairman, or the Chairman may designate the Secretary of The North Carolina State Bar to issue such process. The defendant shall have the right to invoke the powers of the Committee with respect to compulsory process for witnesses and for the production of books, papers, and other writings and documents.

(17) In any hearing admissibility of evidence shall be governed by the rules of evidence applicable in the Superior Court of the State at the time of the hearing. The Chairman of the Hearing Committee shall rule on the admissibility of evidence, subject to the right of any member of the Hearing Committee to question his ruling and, in the event of such question, the entire Hearing Committee shall then rule on the matter of evidence in question.

(18) If the Hearing Committee finds that the charges of misconduct are not established by the greater weight of the evidence, it shall enter an order dismissing the complaint. If the Hearing Committee finds that the charges of misconduct are established by the greater weight of the evidence, the Hearing Committee shall enter an order for discipline. In either instance the Committee shall file a separate order which shall include the Committee's findings of fact and conclusions of law and which shall be accompanied by a certified transcript of the testimony, all pleadings, exhibits and briefs.

(19) If the charges of misconduct are established, the Hearing Committee shall then consider any evidence relevant to the discipline to be imposed, including the record of all previous misconduct for which the defendant has been disciplined in this State or any other jurisdiction and any evidence in mitigation of the offense. A summary of this evidence shall accompany the transcript of the hearing.

(20) All reports and orders shall be signed by the members of the Hearing Committee and shall be filed with the Secretary. Copies of all reports and orders shall be delivered to the parties. The copy to the defendant shall be served as provided in G.S. 1A-1, Rule 4.

(21) In all hearings conducted pursuant to this section, a complete record shall be made of evidence received during the course of the hearing. Such transcript shall be made in the form and by means authorized for civil trials in the courts of this State.

§ 15. Effect of a Finding of Guilt in Any Criminal Case.

(1) Any member of The North Carolina State Bar convicted of a serious crime in any state or federal court, whether such a conviction results from a plea of guilty or nolo contendere or from a verdict after trial, shall, upon the conviction becoming final by affirmation on appeal or expiration of the time within which to perfect an appeal, an appeal not having been perfected, be suspended from the practice of law pending the disposition of any disciplinary proceeding in progress or commenced upon such conviction.

(2) A certificate of the conviction of an attorney for any crime shall be conclusive evidence of guilt of that crime in any disciplinary proceeding instituted against a member.

(3) Upon the receipt of a certificate of conviction of a member of a serious crime, the Grievance Committee will immediately authorize the filing of a complaint if one is not then pending. In the hearing on such complaint the sole issue to be determined will be the extent of the final discipline to be imposed:

Provided, that no hearing based solely upon a certificate of conviction will commence until all appeals from the conviction are concluded.

(4) Upon the receipt of certificate of conviction of a member for a crime not constituting a serious crime, the Grievance Committee will commence whatever action, including the filing of a complaint, it may deem appropriate.

§ 16. Reciprocal Discipline.

(1) Upon receipt of a certified copy of an order demonstrating that a member of The North Carolina State Bar has been disciplined in another jurisdiction, the Grievance Committee shall forthwith issue a notice directed to the accused attorney containing a copy of the order from the other jurisdiction, and an order directing that the accused attorney inform the Committee within 30 days from service of the notice, of any claim by the accused attorney that the imposition of the identical discipline in this State would be unwarranted, and the reasons therefor. This notice is to be served on the accused attorney in accordance with the provisions of G.S. 1A-1, Rule 4.

(2) In the event the discipline imposed in the other jurisdiction has been stayed there, any reciprocal discipline imposed in this State shall be deferred until such stay expires.

(3) Upon the expiration of 30 days from service of the notice issued pursuant to the provisions of (1) above, the Grievance Committee shall impose the identical discipline unless the accused attorney demonstrates:

(a) That the procedure was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or

(b) There was such an infirmity of proof establishing the misconduct as to give rise to the clear conviction that the Grievance Committee could not consistently with its duty accept as final the conclusion on that subject; or

(c) That the imposition of the same discipline would result in grave injustice; or

(d) That the misconduct established has been held to warrant substantially different discipline in this State.

Where the Grievance Committee determines that any of said elements exist, the Committee shall dismiss the case or direct that a complaint be filed.

(4) In all other respects, a final adjudication in another jurisdiction that an attorney has been guilty of misconduct shall establish the misconduct for purposes of a disciplinary proceeding in this State.

§ 17. Surrender of License While Proceeding Pending.

(1) A member who is the subject of an investigation into allegations of misconduct on his part may tender his license to practice, but only by delivering to the Council an affidavit stating that he desires to resign and that:

(a) The resignation is freely and voluntarily rendered; is not the result of coercion or duress; and the member is fully aware of the implications of submitting the resignation;

(b) The member is aware that there is presently pending investigation or other proceedings regarding allegations that the member has been guilty of misconduct, the nature of which shall specifically be set forth;

(c) The member acknowledges that the material facts upon which the complaint is predicated are true; and

(d) The resignation is being submitted because the member knows that if charges were predicated upon the misconduct under investigation the member could not successfully defend against them.

(2) The Council may impose any conditions upon the acceptance of such resignation that it deems appropriate.

(3) Upon acceptance of the required affidavit, the Council shall enter an order suspending or disbaring the member on consent.

(4) The order suspending or disbarring the member on consent shall be a matter of public record. However, the affidavit required under (1) above shall not be publicly disclosed or made available for use in any other proceeding except upon order of a court or the Council.

§ 18. Disability Hearings.

(1) Where a member of The North Carolina State Bar has been judicially declared incompetent or otherwise incapacitated or has been committed voluntarily or involuntarily to a hospital for the mentally disordered under the provisions of Chapter 122 of the General Statutes or similar laws of any jurisdiction, the Council, upon proper proof of the fact, shall enter an order transferring such member to inactive status effective immediately and for an indefinite period until the further order of the Council. A copy of such order shall be served upon such member, his guardian, or the director of the institution to which the member has been committed.

(2) When evidence has been obtained that a member of The North Carolina State Bar has become disabled, the Grievance Committee shall conduct a hearing in a manner that shall conform as nearly as is possible to the procedures set forth in § 13 of this Article. The Grievance Committee shall determine whether a petition alleging disability will be filed in the name of The North Carolina State Bar by the Chairman of the Grievance Committee.

(3) Whenever the Grievance Committee files a petition alleging the disability of a member, the Chairman of the Hearing Commission shall appoint a Hearing Committee as provided in §§ 8(A) (2) and 14 (4) to determine whether such member is disabled. The Hearing Committee shall conduct a hearing on the petition and receive whatever evidence it deems necessary or proper, including the examination of the member by such qualified medical experts as the Hearing Committee shall designate. If, upon due consideration of the matter, the Hearing Committee concludes that the member is disabled, it shall enter an order transferring the member to inactive status on the ground of such disability for an indefinite period and until the further order of the Council. Any hearing in a pending disciplinary proceeding against the member shall be held in abeyance. The Hearing Committee shall provide for such notice to the member of proceedings in the matter as it deems proper and advisable and may appoint an attorney to represent the member if he or she is without adequate representation.

(4) In any proceeding seeking a transfer to inactivate status under this section, the burden of proof shall be on the petitioner.

(5) If, during the course of a disciplinary proceeding, the defendant contends that he is suffering from a disability which makes it impossible for him to defend adequately, the proceeding shall be held in abeyance pending a determination by the Hearing Committee whether such disability exists. If the Hearing Committee concludes that such disability does exist, the disciplinary proceeding shall be held in abeyance until the Hearing Committee shall determine that such disability has been removed. If the Hearing Committee shall determine that the disability contended by the defendant is also one defined in § 3 (12), it shall proceed under the provisions of (3) above as if a petition alleging such disability had been filed by the Grievance Committee. If as a result of such proceeding, the defendant is transferred to inactive status, the disciplinary proceeding shall be held in abeyance as long as the defendant remains in inactive status. If thereafter the defendant is returned to active status by the Council and a Hearing Committee determines that he is able to defend adequately, it may resume the disciplinary proceeding.

§ 19. Enforcement of Powers.

In proceedings before any committee, if any person refuses to respond to a

subpoena, or refuses to take the oath or affirmation as a witness or thereafter refuses to be examined, or refuses to obey any order in aid of discovery, or refuses to obey any lawful order of the committee contained in its decision rendered after hearing the Counsel or Secretary may apply to the appropriate court for an order directing that person to take the requisite action.

§ 20. Notice to Accused of Action and Dismissal.

In every disciplinary case wherein the accused attorney has received a Letter of Notice, and the grievance has been dismissed, the accused attorney shall be notified of the dismissal by letter by the Chairman of the Grievance Committee. The Chairman shall have discretion to give similar notice to the accused attorney in cases wherein a Letter of Notice has not been issued but the Chairman deems such notice to be appropriate.

§ 21. Notice to Complainant.

(1) If the Grievance Committee finds probable cause, the Chairman of the Grievance Committee shall advise the complainant that the grievance has been received and considered and has been referred to the Disciplinary Hearing Commission for hearing.

(2) If final action on a grievance is taken by the Grievance Committee in the form of a Letter of Caution, or a private reprimand, the Chairman of the Grievance Committee shall advise the complainant that the grievance has been received and considered and that final action has been taken thereon but that the result is confidential and may be disclosed only upon the order of a court. If final action on a grievance is a dismissal, complainant and accused attorney shall be so notified.

§ 22. Appointment of Counsel to Protect Clients' Interests When Attorney Disappears, Dies or Is Transferred to Inactive Status Because of Disability.

(1) Whenever a member of The North Carolina State Bar has been transferred to inactive status because of incapacity or disability, or disappears, or dies, and no partner, personal representative or other party capable of conducting the attorney's affairs is known to exist, the Senior Resident Judge of the superior court in the district wherein is located the last address on the register of members, if it is in this State, shall be requested by the Secretary to appoint an attorney or attorneys to inventory the files of the inactive, disappeared or deceased member and to take such action as seems indicated to protect the interests of the inactive, disappeared or deceased member and his or her clients.

(2) Any member so appointed shall not be permitted to disclose any information contained in any files so inventoried without the consent of the client to whom such file relates except as necessary to carry out the order of the court which appointed the attorney to make such inventory, or to assume the representation of any such client.

§ 23. Imposition of Discipline; Finding of Incapacity or Disability; Notice to Courts.

(A) Upon the final determination of a disciplinary proceeding wherein discipline is imposed, one of the following actions shall be taken.

(1) *Reprimand.* A letter of reprimand shall be prepared by the Chairman of the Grievance Committee or the Chairman of the Disciplinary Hearing Commission, depending upon the agency ordering the reprimand. The letter of reprimand shall be served upon the accused attorney or defendant and a copy shall be filed with the Secretary, and shall be considered confidential.

(2) *Public Censure, Suspension or Disbarment.* The Chairman of the Disciplinary Hearing Commission shall file the order of public censure,

suspension or disbarment with the Secretary. The Secretary shall cause a certified copy of the order to be entered upon the judgment docket of the superior court of the county wherein is located the last address listed on the register of members by the disciplined member and filed with the Clerk of the Supreme Court of North Carolina. A judgment of suspension or disbarment shall be effective throughout the State.

(B) Upon the final determination of incapacity or disability the President of the Council or the Chairman of the Disciplinary Hearing Commission, depending upon the agency entering the order, shall file with the Secretary a copy of the order transferring the member to inactive status. The Secretary shall cause a certified copy of the order to be entered upon the judgment docket of the superior court of the county wherein is located the last address listed on the register of members by the disabled member and also upon the minutes of the Supreme Court of North Carolina.

§ 24. Notice to Clients of Disbarred or Suspended Attorneys.

(1) A disbarred or suspended member of The North Carolina State Bar shall promptly notify by registered or certified mail, return receipt requested, all clients being represented in pending matters, other than litigation or administrative proceedings, of the disbarment or suspension and consequent inability of the member to act as an attorney after the effective date of disbarment or suspension and shall advise such clients to seek legal advice elsewhere.

(2) A disbarred or suspended member shall promptly notify, or cause to be notified by registered or certified mail, return receipt requested, each client who is involved in pending litigation or administrative proceedings, and the attorney or attorneys for each adverse party in such matter or proceeding of the disbarment or suspension and consequent inability to act as an attorney after the effective date of the disbarment or suspension. The notice to be given to the client shall recommend the prompt substitution of another attorney or attorneys in the case.

In the event the client does not obtain substitute counsel before the effective date of the disbarment or suspension, it shall be the responsibility of the disbarred or suspended member to move in the court or agency in which the proceeding is pending for leave to withdraw.

The notice to be given to the attorney or attorneys for an adverse party shall state the place of residence of the client of the disbarred or suspended attorney.

(3) Orders imposing suspension or disbarment shall be effective thirty days after being served upon the defendant. The disbarred or suspended attorney, after entry of the disbarment or suspension order, shall not accept any new retainer or engage as attorney for another in any new case or legal matter of any nature. However, during the period from the entry date of the order to its effective date the member may wind up and complete, on behalf of any client, all matters which were pending on the entry date.

(4) Within ten days after the effective date of the disbarment or suspension order, the disbarred or suspended attorney shall file with the Secretary an affidavit showing that he or she has fully complied with the provisions of the order and with the provisions of this section, and all other state, federal and administrative jurisdictions to which he or she is admitted to practice. Such affidavit shall also set forth the residence or other address of the disbarred or suspended member to which communications may thereafter be directed.

(5) The disbarred or suspended member shall keep and maintain records of the various steps taken under this section so that, upon any subsequent proceeding, proof of compliance with this section and with the disbarment or suspension order will be available. Proof of compliance with this section shall be a condition precedent to any petition for reinstatement.

§ 25. Reinstatement.**(A) After suspension or disbarment:**

(1) No member of The North Carolina State Bar suspended or disbarred may resume practice until reinstated by order of the Council.

(2) A person who has been disbarred after hearing or by consent may not apply for reinstatement until the expiration of at least three years from the effective date of the disbarment.

(3) Petitions for reinstatement by disbarred attorneys shall be filed with the Secretary. Upon receipt of the petition the Secretary shall refer the petition to the Chairman of the Disciplinary Hearing Commission. The Chairman shall within seven (7) days appoint a Hearing Committee as provided in section 8 (A) (2), schedule a time and place for the hearing, and notify the Council and the petitioner of the composition of the Hearing Committee and the time and place for the hearing. The petitioner shall have the burden of demonstrating by clear and convincing evidence that he or she has the moral qualifications, competency and learning in law required for admission to practice law in this State and that the resumption of the practice of law within the State by the petitioner will be neither detrimental to the integrity and standing of the bar or the administration of justice nor subversive of the public interest. At the conclusion of the hearing, the Hearing Committee shall promptly file a report containing its findings and recommendations and transmit them together with the record to the Council. The Council shall review the report of the Hearing Committee and the record, and determine whether, and upon what conditions, the petitioner shall be reinstated.

(4) Petitions for reinstatement by suspended attorneys shall be filed with the Secretary. Upon receipt of the petition, the Secretary shall refer the petition to the Council. The Council shall make such inquiry into the matter as it deems necessary. The Council may refer the petition to the Disciplinary Hearing Commission for hearing as set forth in subsection (3) of this section.

(5) In all proceedings upon a petition for reinstatement, cross-examination of the petitioner's witnesses and the submission of evidence, if any, in opposition to the petition shall be conducted by the Counsel.

(6) The Council in its discretion may direct that the necessary expenses incurred in the investigation and processing of a petition for reinstatement be paid by the petitioner.

(B) After transfer to inactive status because of disability:

(1) No member of The North Carolina State Bar transferred to inactive status because of incapacity or disability may resume active status until reinstated by order of the Council. Any member transferred to inactive status because of incapacity or disability shall be entitled to apply for reinstatement to active status once a year or at such shorter intervals as is stated in the order transferring the member to inactive status or any modification thereof.

(2) Petitions for reinstatement by members transferred to inactive status because of disability shall be filed with the Secretary. Upon receipt of the petition the Secretary shall refer the petition to the Chairman of the Disciplinary Hearing Commission. The Chairman shall appoint a Hearing Committee as provided in §§ 8 (A) (2) and 14 (4). The Hearing Committee shall promptly schedule a hearing at which the petitioner shall have the burden of demonstrating by clear and convincing evidence that the disability has been removed and the petitioner is fit to resume the practice of law. Upon such petition the Hearing Committee may take or direct such action as it deems necessary or proper to a determination of whether the disability has been removed, including a direction for an examination of the petitioner by such qualified medical experts as the Hearing Committee shall designate. In its discretion, the Hearing Committee may direct that the expense of such an examination shall be paid by the petitioner. At the conclusion of the hearing,

the Hearing Committee shall promptly file a report containing its findings and recommendations and transmit them together with the record, to the Council. The Council shall review the report of the Hearing Committee and the record, and determine whether, and upon what conditions, the petitioner shall be reinstated.

(3) Where a member has been transferred to inactive status by an order of the Council based on incapacity as defined in § 3 (17) or after commitment on the grounds of incompetency and thereafter, in proceedings duly taken, the member has been judicially declared to be competent or the incapacity has been removed, the Council may dispense with further evidence that the incapacity has been removed and may direct his or her reinstatement to active status upon such terms as are deemed proper and advisable.

(4) The filing of a petition for reinstatement to active status by a member of The North Carolina State Bar transferred to inactive status because of disability shall be deemed to constitute a waiver of any doctor-patient privilege with respect to any treatment of the attorney during the period of the disability. The petitioner shall be required to disclose the name of every psychiatrist, psychologist, physician and hospital or other institution by whom or in which the petitioner has been examined or treated since transfer to inactive status and shall furnish to the Secretary written consent to each to divulge such information and records as requested by the Counsel or a Hearing Committee.

§ 26. Address of Record.

Except where otherwise specified, any provision herein for notice to an accused attorney or a defendant shall be deemed satisfied by appropriate correspondence addressed to that attorney by registered mail at the last address entered in the register of members provided for in Article II, § 1 of these rules.

§ 27. Disqualification Due to Interest.

No member of the Council or Hearing Commission shall participate in any disciplinary matter involving such member, any partner or associate in the practice of law of such member, or in which such member has a personal interest.

§ 28. Trust Accounts; Audit.

(1) Any bank account maintained by a member to comply with the Code of Professional Responsibility of The North Carolina State Bar is, and shall be clearly labeled and designated as, a trust account. Any safe deposit box used in connection with the practice of law in North Carolina maintained by a member of The North Carolina State Bar to comply with the Code of Professional Responsibility shall be located in this State (unless the client otherwise consents in writing) and the member shall advise any institution in which such deposit box is located that the contents of the same may include property of clients.

(2) A member of The North Carolina State Bar shall preserve, or cause to be preserved, the records of all bank accounts or other records pertaining to the funds or property of a client maintained by the member in compliance with the Code of Professional Responsibility for a period of not less than six years subsequent to the last transaction pertaining to the same or subsequent to the final conclusion of the representation of a client relative to such funds or property, whichever shall last occur. Such records shall include checkbooks, cancelled checks, check stubs, vouchers, ledgers, and journals, closing statements, accountings or other statements of disbursement rendered to clients or other parties with regard to trust funds, or similar equivalent records clearly and expressly reflecting the date, amount, source and reason for all receipts, withdrawals, deliveries and disbursements of the funds or property of a client. All of such records shall be kept as a specific prerequisite to the right to receive, deliver and disburse funds or property of a client, and shall have a public aspect

relating to the protection of clients and to fitness of the member to practice law. In any instance of an alleged violation by the member of any Disciplinary Rule of the Code of Professional Responsibility or of other misconduct such records, insofar as they may relate in any way to the transaction, occurrence or client in question, shall be produced by the member for inspection, audit and copying by the Counsel upon the direction of the Chairman of the Grievance Committee or of a Hearing Committee. Such records or copies thereof shall be admissible in evidence in any disciplinary proceeding. Provided: that notice of such intended use shall be given to any client involved, if practicable, unless such client is already aware of such intended use, and, upon good cause shown by such client, the admission of the same shall be under such conditions as shall be reasonably calculated thereafter to protect the confidences of such client in the event that the proceedings otherwise become public records. Permissible means of protection shall not prejudice the accused attorney or defendant and may include, but are not limited to, excision, in camera production, retention in sealed envelopes, or similar devices. Failure to maintain such records or produce them upon such direction shall constitute grounds for disciplinary action without regard to any other matter. The cost of any audit or investigation necessitated by such failure may be taxed against the member.

§ 29. Confidentiality.

All proceedings involving allegations of misconduct by or disability of an attorney shall be kept confidential except as provided in § 14 (12) of this article or unless and until (1) there is entered a final order for the imposition of public discipline, (2) the accused attorney or defendant requests that the matter be public, or (3) the investigation is predicated upon a conviction of the accused attorney or defendant for a crime. In matters involving alleged disability, all proceedings shall be kept confidential unless and until the Council or Hearing Committee enters an order transferring the member to inactive status.

This provision shall not be construed to deny access to relevant information to authorized agencies investigating the qualifications of judicial candidates, or to other jurisdictions investigating qualifications for admission to practice or to law-enforcement agencies investigating qualifications for government employment. In addition, the Secretary shall transmit notice of all public discipline imposed, or transfer to inactive status due to disability, to the National Discipline Data Bank maintained by the American Bar Association.

Editor's Note. — This Article was rewritten by amendments approved by the Supreme Court Nov. 4, 1975, and Feb. 3, 1976, and amended by amendments approved by the Supreme Court May 11, 1977, Feb. 24, 1978, and June 6, 1978.

The amendment approved by the Supreme Court May 11, 1977, added subdivision (32) of § 3, and subdivision (6) of subsection (A) of § 8, and inserted "and deliberating" near the end of subsection (5) of § 13. In § 14 the amendment inserted "of service" and "on the defendant" in the first sentence, "initially" near the beginning of the fourth sentence and added at the end of the fourth sentence the language beginning "unless one or more subsequent complaints" in the first paragraph of subsection (4) and added the second paragraph of subsection (4), rewrote subsection (10), added the language beginning "except for reasons" at the end of the third sentence of subsection (11) and inserted "consider" near the beginning of the first

sentence and "accompany" in the last sentence of subsection (19). In § 23 the amendment inserted "one of" in the introductory language of subsection (A), and in § 25 the amendment rewrote the third and fourth sentences of subdivision A(3).

The amendment approved Feb. 24, 1978 rewrote subdivision (A)(6) of § 5, added subdivision (A)(7) of § 8, rewrote subsection (10) of § 13, rewrote § 21, and rewrote subdivisions (1) and (2) of subsection (A) of § 23.

The amendment approved by the Supreme Court June 6, 1978, inserted "return of" near the beginning of the first sentence of subdivision (4) of § 14, and, also in § 14, inserted "Chairman of the" near the beginning of subdivision (9), added subdivision (9.1), deleted "beyond the control of a party" following "reasons" near the end of the second sentence of subdivision (11), added the proviso at the end of subdivision (11), inserted "Chairman of the" near the beginning of the

second sentence of subdivision (17) and added to that sentence the language beginning "subject to the right," and rewrote the third sentence of subdivision (18). The amendment also inserted

"one of" in the introductory language of subsection (A) of § 23 and added "and shall be considered confidential" at the end of subdivision (1) of subsection (A) of § 23.

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Appendix VII. Code of Professional Responsibility of the North Carolina State Bar

CANON 2. A LAWYER SHOULD ASSIST THE LEGAL PROFESSION IN FULFILLING ITS DUTY TO MAKE LEGAL COUNSEL AVAILABLE.

Ethical Considerations.

Recognition of Legal Problems.

Selection of a Lawyer: Generally.

Selection of a Lawyer: Lawyer Advertising.

Disciplinary Rules.

DR 2-101 Publicity.

DR 2-102 Professional Notices, Letterheads, Offices, and Law Lists.

DR 2-103 Recommendation of Professional Employment.

DR 2-104 Suggestion of Need of Legal Services.

DR 2-105 Designation of Areas of Practice.

CANON 1

A Lawyer Should Assist in Maintaining the Integrity and Competence of the Legal Profession

Effect of Plea of Nolo Contendere on Subsequent Disciplinary Proceedings. — Defendant's plea of nolo contendere in the Federal District Court to a charge of receiving and possessing chattels valued at less than \$100.00 knowing them to have been stolen or

embezzled did not entitle the State Bar to summary judgment authorizing disciplinary action against the defendant. North Carolina State Bar v. Hall, 293 N.C. 539, 238 S.E.2d 521 (1977).

CANON 2

A Lawyer Should Assist the Legal Profession in Fulfilling Its Duty to Make Legal Counsel Available

ETHICAL CONSIDERATIONS

Recognition of Legal Problems

EC2-2 The legal profession should assist laypersons to recognize legal problems because such problems may not be self-revealing and often are not timely noticed. Therefore, lawyers should encourage and participate in educational and public relations programs concerning our legal system with particular reference to legal problems that frequently arise. Preparation of advertisements and professional articles for lay publications and participation in seminars, lectures, and civic programs should be motivated by a desire to educate the public to an awareness of legal needs and to provide information relevant to the selection of the most appropriate counsel rather than to obtain publicity for particular lawyers, and a lawyer who participates in such activities should shun personal publicity.

EC2-3 Whether a lawyer acts properly in volunteering in-person advice to a layperson to seek legal services depends upon the circumstances. The giving of advice that one should take legal action could well be in fulfillment of the duty of the legal profession to assist laypersons in recognizing legal problems. The advice is proper only if motivated by a desire to protect one who does not recognize that he may have legal problems or who is ignorant of his legal rights or obligations. It is improper if motivated by a desire to obtain personal benefit,

secure personal publicity, or cause legal action to be taken merely to harass or injure another. A lawyer should not initiate an in-person contact with a non-client, personally or through a representative, for the purpose of being retained to represent him for compensation.

EC2-4 Since motivation is subjective and often difficult to judge, the motives of a lawyer who volunteers in-person advice likely to produce legal controversy may well be suspect if he receives professional employment or other benefits as a result. A lawyer who volunteers in-person advice that one should obtain the services of a lawyer generally should not himself accept employment, compensation, or other benefit in connection with that matter. However, it is not improper for a lawyer to volunteer such advice and render resulting legal services to close friends, relatives, former clients (in regard to matters germane to former employment), and regular clients.

EC2-5 A lawyer who writes or speaks for the purpose of educating members of the public to recognize their legal problems should carefully refrain from giving or appearing to give a general solution applicable to all apparently similar individual problems, since slight changes in fact situations may require a material variance in the applicable advice; otherwise, the public may be misled and misadvised. Talks and writings by lawyers for laypersons should caution them not to attempt to solve individual problems upon the basis of the information contained therein.

Selection of a Lawyer: Generally

EC2-7 Changed conditions, however, have seriously restricted the effectiveness of the traditional selection process. Often the reputations of lawyers are not sufficiently known to enable laypersons to make intelligent choices. The law has become increasingly complex and specialized. Few lawyers are willing and competent to deal with every kind of legal matter, and many laypersons have difficulty in determining the competence of lawyers to render different types of legal services. The selection of legal counsel is particularly difficult for transients, persons moving into new areas, persons of limited education or means, and others who have little or no contact with lawyers. Lack of information about (1) the availability of lawyers, (2) the practice preferences of particular lawyers, and (3) the expense of legal representation leads laypersons to avoid seeking legal advice.

EC2-8 Selection of a lawyer by a layperson should be made on an informed basis. Advice and recommendation of third parties — relatives, friends, acquaintances, business associates, or other lawyers and disclosure of relevant information about the lawyer and his practice may be helpful. A layperson is best served if the recommendation is disinterested and informed. In order that the recommendation be disinterested, a lawyer should not seek to influence another to recommend his employment. A lawyer should not compensate another person for recommending him, for influencing a prospective client to employ him, or to encourage future recommendations. Advertisements and public communications, whether in law lists, telephone directories, newspapers, or other media, should be formulated to convey other information that is necessary to make an appropriate selection. Such information includes: (1) office information, such as, name, including name of law firm and names of professional associates; addresses; telephone numbers; credit card acceptability; fluency in foreign languages; and office hours; (2) relevant biographical information; (3) description of the practice, for example, one or more fields of law in which the lawyer or law firm practices or a statement that practice is limited to one or more fields of law; and (4) permitted fee information. Self-laudation is unprofessional and improper.

Selection of a Lawyer: Lawyer Advertising

EC2-9 The lack of sophistication on the part of many members of the public concerning legal services, the importance of the interests affected by the choice of a lawyer and prior experience with unrestricted lawyer advertising, require that special care be taken by lawyers to avoid misleading the public and to assure that the information set forth in any advertising is relevant to the selection of a lawyer. The lawyer must be mindful that the benefits of lawyer advertising depend upon its reliability and accuracy. Examples of information in lawyer advertising that would be deceptive include misstatements of fact, suggestions that the ingenuity or prior record of a lawyer rather than the justice of the claim are the principal factors likely to determine the result, inclusion of information irrelevant to selecting a lawyer, and representations concerning the quality of service. Since lawyer advertising is calculated and not spontaneous, reasonable regulations of lawyer advertising designed to foster compliance with appropriate standards serves the public interest without impeding the flow of useful, meaningful, and relevant information to the public.

EC2-10 A lawyer should ensure that the information contained in any advertising which the lawyer publishes, broadcasts or causes to be published or broadcast is relevant and is disseminated in an objective and understandable fashion. A lawyer should strive to communicate such information without undue emphasis upon style and advertising stratagems which serve to hinder rather than to facilitate intelligent selection of counsel. Because technological change is a recurrent feature of communications forms, and because perceptions of what is relevant in lawyer selection may change, lawyer advertising regulations should not be cast in rigid, unchangeable terms. Machinery is therefore available to advertisers and consumers for prompt consideration of proposals to change the rules governing lawyer advertising. The determination of any request for such change should depend upon whether the proposal is necessary in light of existing Code provisions, whether the proposal accords with standards of accuracy, reliability and truthfulness, and whether the proposal would facilitate informed selection of lawyers by potential consumers of legal services. Representatives of lawyers and consumers should be heard in addition to the applicant concerning any proposed change. And change which is approved should be promulgated in the form of an amendment to the Code so that all lawyers practicing in the jurisdiction may avail themselves of its provisions.

EC2-11 The name under which a lawyer conducts his practice may be a factor in the selection process. The use of a trade name or an assumed name could mislead laypersons concerning the identity, responsibility, and status of those practicing thereunder. Accordingly, a lawyer in private practice should practice only under a designation containing his own name, the name of a lawyer employing him, the name of one or more of the lawyers practicing in a partnership, or, if permitted by law, the name of a professional legal corporation, which should be clearly designated as such. For many years some law firms have used a firm name retaining one or more names of deceased or retired partners and such practice is not improper if the firm is a bona fide successor of a firm in which the deceased or retired person was a member, if the use of the name is authorized by law or by contract, and if the public is not misled thereby. However, the name of a partner who withdraws from a firm but continues to practice law should be omitted from the firm name in order to avoid misleading the public.

EC2-14 In some instances a lawyer confines his practice to a particular field of law. Because of the absence of controls to insure the existence of special competence, a lawyer should not hold himself out as a specialist, or as having special training or ability, other than in the fields of admiralty, trademark, and

patent law where a holding out as a specialist historically has been permitted. A lawyer may, however, indicate in permitted advertising, if it is factual, a limitation of his practice or that he practices in one or more particular areas or fields of law, using designations authorized for that purpose by The North Carolina State Bar. If a lawyer discloses areas of law in which he practices or limits his practice, he should avoid any implication that he is in fact especially competent.

DISCIPLINARY RULES

DR2-101 Publicity.

- (A) A lawyer shall not, on behalf of himself, his partner, associate or any other lawyer affiliated with him or his firm, use, or participate in the use of, any form of public communication containing a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim.
- (B) In order to facilitate the process of informed selection of a lawyer by potential customers of legal services, a lawyer may publish or broadcast, subject to DR2-103, information in print media or over radio television.

Print media includes only regularly published newspapers, magazines and other periodicals, classified telephone directories, city, county and suburban directories, law directories and law lists. The information disclosed by the lawyer in such publication or broadcast shall comply with DR2-101 (A) and be presented in a dignified manner without the use of the lawyer's voice or portrait and without the use of drawings, illustrations, animations, portrayals, dramatizations, slogans, music, lyrics or pictures. Only the following information may be published or broadcast:

- (1) Name, including name of law firm and names of professional associates; addresses and telephone numbers;
- (2) One or more fields of law in which the lawyer or law firm practices, or a statement that practice is limited to one or more fields of law, to the extent authorized under DR2-105;
- (3) Date and place of birth;
- (4) Date and place of admission to the bar of state and federal courts;
- (5) School attended, with dates of graduation and degrees awarded;
- (6) Foreign language ability;
- (7) Whether credit cards or other credit arrangements are accepted;
- (8) Office and telephone answering service hours;
- (9) Fee for an initial consultation;
- (10) Availability upon request of a written schedule of fees and/or an estimate of the fee to be charged for specific services;
- (11) Contingent fee rates subject to DR2-106(C), provided that the statement discloses whether percentages are computed before or after deduction of costs;
- (12) Range of fees for services, provided that the statement discloses that the specific fee within the range which will be charged will vary depending upon the particular matter to be handled for each client and the client is entitled without obligation to an estimate of the fee within the range likely to be charged, in print size equivalent to the largest print used in setting forth the fee information;

- (13) Hourly rate, provided that the statement discloses that the total fee charged will depend upon the number of hours which must be devoted to the particular matter to be handled for each client and the client is entitled to without obligation an estimate of the fee likely to be charged, in print size at least equivalent to the largest print used in setting forth the fee information;
- (14) Fixed fees for an uncontested divorce, an uncontested adoption, an uncontested personal bankruptcy, a change of name, and other, specific legal services, the description of which would not be misunderstood or be deceptive, provided that the statement discloses that the quoted fee will be available only to clients whose matters fall into the categories described and that the client is entitled without obligation to a specific estimate of the fee likely to be charged, in print size at least equivalent to the largest print used in setting forth the fee information;
- (C) Any person desiring to expand the information authorized for disclosure in DR 2-101(B), or to provide for its dissemination through other forums may apply to The North Carolina State Bar. Any such application shall be served upon The North Carolina State Bar, which shall be heard, together with the applicant, on the issue of whether the proposal is necessary in light of the existing provisions of the Code, accords with standards of accuracy, reliability and truthfulness, and would facilitate the process of informed selection of lawyers by potential consumers of legal services. The relief granted in response to any such application shall be promulgated as amendments to DR 2-101(B) and other affected ethical considerations and disciplinary rules, universally applicable to all lawyers.
- (D) If the advertisement is communicated to the public over radio or television, it shall be prerecorded and approved in advance by the lawyer. A copy of all written advertisements and a written transcript of the actual transmission of all broadcast advertisements, certified to be an accurate copy or transcript by affidavit of a representative of the publisher or broadcaster, shall be retained by the lawyer for a period not less than three years.
- (E) If a lawyer advertises a fee for a service, the lawyer must render that service for no more than the fee advertised.
- (F) If a lawyer publishes any fee information authorized under DR 2-101(B) in a publication that is published more frequently than one time per month, the lawyer shall be bound by any representation made therein for a period of not less than 30 days after such publication. If a lawyer publishes any fee information authorized under DR 2-101(B) in a publication that is published once a month or less frequently, he shall be bound by any representation made therein until the publication of the succeeding issue. If a lawyer publishes any fee information authorized under DR 2-101(B) in a publication which has no fixed date for publication of a succeeding issue, the lawyer shall be bound by any representation made therein for a reasonable period of time after publication but in no event less than one year. Unless otherwise specified, if a lawyer broadcasts any fee information authorized under DR 2-101(B), the lawyer shall be bound by any representation made thereon for a period of not less than 30 days after such broadcast.
- (G) This rule does not prohibit limited and dignified identification of a lawyer as a lawyer as well as by name;

- (1) In political advertisements when his professional status is germane to the political campaign or to a political issue.
 - (2) In public notices when the name and profession of a lawyer are required or authorized by law or are reasonably pertinent for a purpose other than the attraction of potential clients.
 - (3) In routine reports and announcements of a bona fide business, civic, professional, or political organization in which he serves as a director or officer.
 - (4) In and on legal documents prepared by him.
 - (5) In and on legal textbooks, treatises, and other legal publications, and in dignified advertisements thereof.
- (H) A lawyer shall not compensate or give anything of value to representatives of the press, radio, television, or other communication medium in anticipation of or in return for professional publicity in a news item.

DR2-102 Professional Notices, Letterheads, Offices, and Law Lists.

(A) A lawyer or law firm shall not use or participate in the use of professional cards, professional announcement cards, office signs, letterheads, law lists, legal directory listings, or similar professional notices or devices, except that the following may be used if they are in dignified form:

- (1) A professional card of a lawyer identifying him by name and as a lawyer, and giving his addresses, telephone numbers, the name of his law firm, and any information permitted under DR 2-105. A professional card of a law firm may also give the names of members and associates. Such cards may be used for identification.
- (2) A brief professional announcement card stating new or changed associations or addresses, change of firm name, or similar matters pertaining to the professional offices of a lawyer or law firm, which may be mailed to lawyers, clients, former clients, personal friends, and relatives. It shall not state biographical data except to the extent reasonably necessary to identify the lawyer or to explain the change in his association, but it may state the immediate past position of the lawyer. It may give the names and dates of predecessor firms in a continuing line of succession. It shall not state the nature of the practice except as permitted under DR 2-105.
- (3) A sign on or near the door of the office and in the building directory identifying the law office. The sign shall not state the nature of the practice, except as permitted under DR 2-105.
- (4) A letterhead of a lawyer identifying him by name and as a lawyer, and giving his addresses, telephone numbers, the name of his law firm, associates and any information permitted under DR 2-105. A letterhead of a law firm may also give the names of members and associates, and names and dates relating to deceased and retired members. A lawyer may be designated "Of Counsel" on a letterhead if he has a continuing relationship with a lawyer or law firm, other than as a partner or associate. A lawyer or law firm may be designated as "General Counsel" or by similar professional reference on stationery of a client if he or the firm devotes a substantial amount of professional time in the representation of that client. The letterhead of a law firm may give the names and dates of predecessor firms in a continuing line of succession.

- (5) A listing in a reputable law list, legal directory, or a directory published by a state, county or local bar association, giving brief biographical and other informative data. A law list or any directory is not reputable if its management or contents are likely to be misleading or injurious to the public or to the profession. The published data may include the information allowed by DR 2-101(B) together with the following: one or more of the practice area designations or descriptions regularly used by the reputable law list or directory; scholastic distinctions; public or quasi-public offices; military service; posts of honor; legal authorships; legal teaching positions; memberships, offices, committee assignments, and section memberships in bar associations; memberships and offices in legal fraternities and legal societies; technical and professional licenses; memberships in scientific, technical and professional associations and societies; names and addresses of references; and, with their consent, names of clients regularly represented.
- (B) A lawyer in private practice shall not practice under a trade name, a name that is misleading as to the identity of the lawyer or lawyers practicing under such name, or a firm name containing names other than those of one or more of the lawyers in the firm, except that the name of a professional corporation or professional association may contain "P.C." or "P.A." or similar symbols indicating the nature of the organization, and if otherwise lawful a firm may use as, or continue to include in, its name the name or names of one or more deceased or retired members of the firm or of a predecessor firm in continuing line of succession. A lawyer who assumes a judicial, legislative, or public executive or administrative post or office shall not permit his name to remain in the name of a law firm or to be used in professional notices of the firm during any significant period in which he is not actively and regularly practicing law as a member of the firm, and during such period other members of the firm shall not use his name in the firm name or in professional notices of the firm.
- (C) A lawyer shall not hold himself out as having a partnership with one or more other lawyers unless they are in fact partners.
- (D) A partnership shall not be formed or continued between or among lawyers licensed in different jurisdictions unless all enumerations of the members and associates of the firm on its letterhead and in other permissible listings make clear the jurisdictional limitations on those members and associates of the firm not licensed to practice in all listed jurisdictions; however, the same firm name may be used in each jurisdiction.
- (E) A lawyer who is engaged both in the practice of law and another profession or business shall not so indicate on his letterhead, office sign, or professional card, nor shall he identify himself as a lawyer in any publication in connection with his other profession or business.
- (F) Nothing contained herein shall prohibit a lawyer from using or permitting the use of, in connection with his name, an earned degree or title derived therefrom indicating his training in the law.

DR2-103 Recommendation of Professional Employment.

- (A) A lawyer shall not, except as authorized in DR 2-101(B), recommend employment as a private practitioner, of himself, his partner, or

associate to a layperson who has not sought his advice regarding employment of a lawyer.

(B) A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure his employment by a client, or as a reward for having made a recommendation resulting in his employment by a client, except that he may pay the usual and reasonable fees or dues charged by any of the organizations listed in DR 2-103(D).

(C) A lawyer shall not request a person or organization to recommend or promote the use of his services or those of his partner or associate, or any other lawyer affiliated with him or his firm, as a private practitioner, except as authorized in DR 2-101, and except that,

(1) He may request referrals from a lawyer referral service operated, sponsored, or approved by a bar association and may pay its fees incident thereto.

(2) He may cooperate with the legal service activities of any of the offices or organizations enumerated in DR 2-103(D) (1) through (4) and may perform legal services for those to whom he was recommended by it to do such work if:

(a) The person to whom the recommendation is made is a member or beneficiary of such office or organization; and

(b) The lawyer remains free to exercise his independent professional judgment on behalf of his client.

(D) A lawyer or his partner or associate or any other lawyer affiliated with him or his firm may be recommended, employed or paid by, and may cooperate with, one of the following offices or organizations that promote the use of his services or those of his partner or associate or any other lawyer affiliated with him or his firm if there is no interference with the exercise of independent professional judgment in behalf of his client:

(1) A legal aid office or public defender office:

(a) Operated or sponsored by a duly accredited law school.

(b) Operated or sponsored by a bona fide nonprofit community organization.

(c) Operated or sponsored by a governmental agency.

(d) Operated, sponsored, or approved by a bar association.

(2) A military legal assistance office.

(3) A lawyer referral service operated, sponsored or approved by a bar association.

(4) Any bona fide organization that recommends, furnishes or pays for legal services to its members or beneficiaries provided the following conditions are satisfied:

(a) Such organization, whether or not organized for profit, including any affiliate, is so organized and operated that no profit is derived by it from the rendition of legal services by lawyers.

(b) Neither the lawyer, nor his partner; nor associate, nor any other lawyer affiliated with him or his firm, nor any non-lawyer shall have initiated or promoted such organization for the primary purpose of providing financial or other benefit to such lawyer, partner, associate or affiliated lawyer.

(c) Such organization is not operated for the purpose of procuring legal work or financial benefit for any lawyer as a private practitioner outside of the legal services program of the organization.

- (d) The member or beneficiary to whom the legal services are furnished, and not such organization, is recognized as the client of the lawyer in the matter.
 - (e) Any member or beneficiary who is entitled to have legal services furnished or paid for by the organization may, if such member or beneficiary so desires, at his own expense, select counsel in addition to that furnished, selected or approved by the organization for the particular matter involved; and the legal service plan of such organization provides appropriate relief for any member or beneficiary who asserts a claim that representation by counsel furnished, selected or approved would be unethical, improper or inadequate under the circumstances of the matter involved and the plan provides an appropriate procedure for seeking such relief.
 - (f) The lawyer does not know or have cause to know that such organization is in violation of applicable laws, rules of court and other legal requirements that govern its legal service operations.
 - (g) Such organization has filed with the appropriate disciplinary authority at least annually a report with respect to its legal service plan, if any, showing its terms, its schedule of benefits, its subscription charges, agreements with counsel, and financial results of its legal service activities or, if it has failed to do so, the lawyer does not know or have cause to know of such failure.
- (E) A lawyer shall not accept employment when he knows or it is obvious that the person who seeks his services does so as a result of conduct prohibited under this Disciplinary Rule.

DR2-104 Suggestion of Need of Legal Services.

- (A) A lawyer who has given in-person unsolicited advice to a layperson that he should obtain counsel or take legal action shall not accept employment resulting from that advice, except that:
- (1) A lawyer may accept employment by a close friend, relative, former client (if the advice is germane to the former employment), or one whom the lawyer reasonably believes to be a client.
 - (2) A lawyer may accept employment that results from his participation in activities designed to educate laypersons to recognize legal problems, to make intelligent selection of counsel, or to utilize available legal services if such activities are conducted or sponsored by a qualified legal assistance organization.
 - (3) A lawyer who is recommended, furnished or paid by a qualified legal assistance organization enumerated in DR 2-103(D) (1) through (4) may represent a member or beneficiary thereof, to the extent and under the conditions prescribed therein.
 - (4) Without affecting his right to accept employment, a lawyer may speak publicly or write for publication on legal topics so long as he does not emphasize his own professional experience or reputation and does not undertake to give individual advice.

DR2-105 Designation of Areas of Practice.

A lawyer shall not hold himself out publicly as a specialist or as having better qualifications than others. But a lawyer may in a manner consistent with DR

2-101 and DR 2-102 hold himself out publicly as practicing in certain areas of law or as limiting his practice as follows:

- (A) A lawyer admitted to practice before the United States Patent and Trademark Office may use the designation "Patents," "Patent Attorney," "Patent Lawyer," or "Registered Patent Attorney" or any combination of those terms, on his letterhead and office sign.
- (B) Any lawyer may publicly disclose the field or fields of law in which the lawyer or the law firm practices, or to which the practice is limited, but only by using the practice area designations authorized by the North Carolina State Bar and published in its official publications.

Editor's Note. — The amendment approved by the Supreme Court February 24, 1978, rewrote EC 2-2 through EC 2-5, EC 2-7 through EC 2-11 and EC 2-14 of the Ethical Considerations and rewrote DR 2-101 through DR 2-105 of the Disciplinary Rules.

The amendment approved by the Supreme Court June 6, 1978, inserted "one or more of the practice area designations or descriptions regularly used by the reputable law list or

directory," near the beginning of the third sentence of subdivision (5) of subsection (A) of DR 2-102 of the Disciplinary Regulations.

Only the paragraphs changed by the amendments are set out.

For note on covenants not to compete between attorneys, see 50 N.C.L. Rev. 936 (1972).

For article, "The Advent of Prepaid Legal Services in North Carolina," see 13 Wake Forest L. Rev. 271 (1977).

CANON 5

A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client

Representation of Multiple Clients Resulting in Conflict of Interest. — In a suit against the United States to recover losses resulting from an airplane crash, representation by the Department of Justice of both the United States and individual air traffic controllers would create a conflict of interest and would prevent adequate representation of the individual controllers. *Aetna Cas. & Sur. Co. v. United States*, 438 F. Supp. 886 (W.D.N.C. 1977).

Informed Consent of Client as to Potential Conflict of Interest. — The consent of an

individual litigant to representation by counsel with a potential conflict of interest by his representation of another party cannot be presumed to be fully informed when it is procured without the advice of a lawyer who has no conflict of interest. *Aetna Cas. & Sur. Co. v. United States*, 438 F. Supp. 886 (W.D.N.C. 1977).

Applied in *Aetna Cas. & Sur. Co. v. United States*, 570 F.2d 1197 (4th Cir. 1978).

CANON 7

A Lawyer Should Represent a Client Zealously within the Bounds of the Law

It is improper for a lawyer to assert his opinion that a witness is lying. He can argue to the jury that they should not believe a witness, but he should not call him a liar. *State v. Locklear*, 294 N.C. 210, 241 S.E.2d 65 (1978).

A cross-examination by which the prosecutor places before the jury inadmissible and prejudicial matter is highly improper and, if knowingly done, unethical. *State v. Locklear*, 294 N.C. 210, 241 S.E.2d 65 (1978).

Injecting Beliefs Not Supported By Evidence. — Counsel may not, by argument or cross-examination, place before the jury incompetent and prejudicial matters by injecting his own knowledge, beliefs and personal opinions not supported by the evidence. *State v. Locklear*, 294 N.C. 210, 241 S.E.2d 65 (1978).

Appendix VII-A. Code of Judicial Conduct

CANON 1

A Judge Should Uphold the Integrity and Independence of the Judiciary

Code Is Guide to Meaning of § 7A-376. — to the meaning of § 7A-376. In re Nowell, 293 N.C. 235, 237 S.E.2d 246 (1977).
The General Assembly intended the North Carolina Code of Judicial Conduct to be a guide

CANON 3

A Judge Should Perform the Duties of His Office Impartially and Diligently

Failure to Accord Prosecutor Opportunity to Be Heard. — A criminal prosecution is an adversary proceeding in which the prosecuting attorney and defendant or his counsel are entitled to be present and to be heard. Failure to accord the prosecutor such opportunity violates this Canon. In re Nowell, 293 N.C. 235, 237 S.E.2d 246 (1977).

Appendix VIII. Regulations Relating to the Appointment of Counsel for Indigent Defendants in Certain Criminal Cases

Article.

IV. Appointment of Counsel.

ARTICLE IV.

Appointment of Counsel.

Section 4.8. Notwithstanding any other provision of this Article or any plans or assigned counsel lists adopted by a district bar pursuant thereto, an indigent defendant charged with a capital offense shall be entitled to be represented by one counsel provided in appropriate cases in the discretion of the Court one additional assistant counsel at either the trial or appellate level, or both, may be appointed.

Section 4.9. Notwithstanding any other provisions of this Article or any plans or assigned counsel lists adopted by a district bar pursuant thereto, no attorney shall be appointed to represent at the trial level any indigent defendant charged with a capital crime in a district which does not have a public defender:

(a) Who does not have a minimum of five years' experience in the general practice of law, provided that the Court may in its discretion appoint as assistant counsel an attorney who has less experience.

(b) Who has not been found by the court appointing him to have a demonstrated proficiency in the field of criminal trial practice.

For the purpose of this section the term general practice of law shall be deemed to include service as a prosecuting attorney in any District Attorney's office.

Section 4.10. Notwithstanding any other provision of this Article or any plans or assigned counsel lists adopted by a district bar pursuant thereto, no attorney shall be appointed to represent at the appellate level any indigent defendant convicted of a capital crime in a district which does not have a public defender:

(a) Who does not have a minimum of five years' experience in the general practice of law, provided, that the Court may in its discretion appoint as assistant counsel an attorney who has less experience.

(b) Who has not been found by the trial judge to have a demonstrated proficiency in the field of appellate practice.

For the purpose of this section the term general practice of law shall be deemed to include service as a prosecuting attorney in any District Attorney's office.

Unless good cause is shown an attorney representing the indigent defendant at the trial level shall represent him at the appellate level if the attorney is otherwise qualified under the provisions of this section.

Editor's Note. — The amendment adopted by the Council of The North Carolina State Bar at its meeting on October 27, 1977, further

considered on January 13, 1977, and April 14, 1978, and approved by the Supreme Court May 26, 1978, added sections 4.8 to 4.10.

Appendix IX. Rules Governing Admission to Practice of Law

(Effective February 1, 1976.)

NORTH CAROLINA ADMINISTRATIVE CODE

TITLE 21

OCCUPATIONAL LICENSING BOARDS

CHAPTER 30

BOARD OF LAW EXAMINERS

Section .0100. Organization

.0103 MEMBERSHIP

Section .0200. General Provisions

.0202 DEFINITIONS

.0206 NONPAYMENT OF FEES

Section .0400. Applications of General Applicants

.0403 FILING DEADLINE

.0406 BAD CHECK POLICY (Deleted)

Section .0500. Requirements for Applicants

.0501 REQUIREMENTS FOR GENERAL APPLICANTS

.0502 REQUIREMENTS FOR COMITY APPLICANTS

Section .0700. Educational Requirements

.0701 GENERAL EDUCATION

Section .1100. Rulemaking Procedures

[Repealed]

Section .1200. Board Hearings

.1201 NATURE OF HEARINGS

.1202 NOTICE OF HEARING

.1203 WHO SHALL CONDUCT HEARINGS

.1204 CONTINUANCES; MOTIONS FOR

.1205 SUBPOENAS

.1206 DEPOSITIONS AND DISCOVERY

.1207 REOPENING OF A CASE

SECTION .0100. ORGANIZATION

.0103 Membership

The Board of Law Examiners of the State of North Carolina consists of eleven members of the North Carolina Bar elected by the Council of the North Carolina State Bar. One member of said board is elected by the board to serve as chairman for such period as the board may determine. The board also employs an executive secretary to enable the board to perform its duties promptly and properly. The executive secretary, in addition to performing the administrative functions of the position, may act as attorney for the board.

Editor's Note. — The amendment adopted by the Board of Law Examiners on June 23, 1977, and filed July 1, 1977, substituted "eleven

members" for "nine members" in the first sentence.

SECTION .0200. GENERAL PROVISIONS

.0202 Definitions

(a) The term "board" as used in this chapter refers to the "Board of Law Examiners of the State of North Carolina." A majority of the members of the

APPENDIX IX—RULES GOVERNING ADMISSION TO PRACTICE OF LAW

board shall constitute a quorum, and the action of a majority of a quorum, present and voting, shall constitute the action of the board.

(d) As used in these rules, the word "filing" or "filed" shall mean received in the office of the Board of Law Examiners.

(e) As used in these rules, the word "chapter" refers to the "Rules Governing Admission to the Practice of Law in the State of North Carolina."

Editor's Note. — The amendment adopted by the Board of Law Examiners on June 23, 1977, and certified July 1, 1977, added the second sentence of subsection (a) and added subsections (d) and (e).

As subsections (b) and (c) were not changed by the amendment, they are not set out.

.0206 Nonpayment Fees

Failure to pay the fees as required by these rules shall result in a denial of the registration or application to take the North Carolina Bar Examination. All checks payable to the board for any fees which are not honored upon presentment shall be returned to the registrant or applicant who shall, within ten (10) days following the receipt thereof, pay to the board in cash, cashier's check, certified check or money order, any fees payable to the board.

Editor's Note. — This rule was adopted by the Board of Law Examiners on June 23, 1977, and certified July 1, 1977.

SECTION .0400. APPLICATIONS OF GENERAL APPLICANTS

.0403 Filing Deadline

Applications must be filed with and received by the secretary at the offices of the board not later than 12:00 noon, Eastern Standard Time, on the second Tuesday in January of the year in which the applicant applies to take the written bar examination; provided, however, upon petition to the board and for good cause shown and upon payment of a late filing fee of \$100 (in addition to all other fees required by these rules), an applicant may be permitted to file a late application with the board no later than the third Tuesday in February of the year in which the applicant applies to take the written bar examination.

Editor's Note. — The amendment adopted June 23, 1977, certified July 1, 1977, added the proviso.

.0406 Bad Check Policy (Deleted)

Editor's Note. — This rule was deleted by amendment adopted June 23, 1977, certified July 1, 1977.

SECTION .0500. REQUIREMENTS FOR APPLICANTS

.0501 Requirements for General Applicants

Before being licensed by the board to practice law in the State of North Carolina, a general applicant shall:

(4) (repealed)

Editor's Note. — The amendment adopted June 23, 1977, certified July 1, 1977, repealed subdivision (4).

As the other subdivisions were not changed by the amendment, they are not set out.

.0502 Requirements for Comity Applicants

- (1) (repealed)
- (5) prove to the satisfaction of the board:
 - (a) that the applicant is licensed to practice law in a state, the District of Columbia or a territory of the United States having comity with North Carolina; and
 - (b) that in such state, the District of Columbia or a territory of the United States having comity with North Carolina the applicant has been, for at least three (3) years out of the last five (5) years immediately preceding the filing of his application with the secretary, actively and substantially engaged in:
 - (i) the practice of law as defined by G.S. 84-2.1, or
 - (ii) activities which would constitute the practice of law if done for the general public, or
 - (c) that in such state, the District of Columbia, or a territory of the United States having comity with North Carolina the applicant has been, for at least three (3) years out of the last five (5) years immediately preceding the filing of his application with the secretary, serving as,
 - (i) a judge of a court of record, or
 - (ii) a full-time teacher in a law school approved by the Council of the North Carolina State Bar, or
 - (d) that the applicant has been, for at least three (3) years out of the last five (5) years immediately preceding the filing of his application with the secretary, serving as
 - (i) a full-time teacher in a North Carolina law school approved by the Council of the North Carolina State Bar, or
 - (ii) a full-time member of the faculty of the Institute of Government of the University of North Carolina at Chapel Hill, or
 - (e) that the applicant has been for at least three (3) years out of the last five (5) years immediately preceding the filing of his application with the secretary, serving in the Armed Forces of the United States of America and has been actively and substantially engaged in:
 - (i) the practice of law as defined by G.S. 84-2.1, or
 - (ii) activities which would constitute the practice of law if done for the general public.

Time spent in active military service of the United States, not to exceed three (3) years, may be excluded in computing the five (5) year period referred to in subsection (b) above. Time spent in North Carolina in activities which would constitute the practice of law if done for the general public, not to exceed three (3) years, may be included in computing the five (5) year period referred to in subsections (b), (c) and (d) above.
- (7) be in good professional standing in the state, the District of Columbia or territory of the United States from which he seeks comity;
- (10) not have taken and failed the written North Carolina Bar Examination within five (5) years prior to the date of filing of the applicant's comity application.

APPENDIX IX—RULES GOVERNING ADMISSION TO PRACTICE OF LAW

Editor's Note. — The amendment adopted at a regular quarterly meeting of the North Carolina State Bar and approved by the Supreme Court Jan. 31, 1977, inserted "the District of Columbia or a territory of the United States" and added "and" in paragraph (a) of subdivision (5), rewrote the introductory language in paragraph (b) of subdivision (5), deleted former clauses (iii) and (iv), and the former last sentence of paragraph (b) of subdivision (5) and added paragraph (c) of subdivision (5). Clauses (i), (ii), and (iii) and the next-to-last sentence of new paragraph (c) incorporated the substance of the provisions deleted in paragraph (b). The amendment also inserted "the District of Columbia or territory of the United States" in subdivision (7) and added subdivision (10).

The amendment adopted June 23, 1977, certified July 1, 1977, repealed subdivision (1), which read "be a citizen of the United States," and, in subdivision (5), deleted former clause (iii) of paragraph (c) as added by the amendment certified Jan. 27, 1977, added present paragraph (d), of which clause (ii) duplicates the clause deleted in paragraph (c), and inserted the reference to paragraph (d) near the end of subdivision (5).

The amendment adopted at a regular quarterly meeting of the Council of the North Carolina State Bar and approved by the Supreme Court Feb. 24, 1978, added subdivision (4)(e).

Only the subdivisions changed by the amendments have been set out.

SECTION .0700. EDUCATIONAL REQUIREMENTS

.0701 General Education

Each applicant to take the examination must have satisfactorily completed the academic work required for admission to a law school approved by the Council of the North Carolina State Bar.

Editor's Note. — The amendment adopted June 23, 1977, and certified July 1, 1977, rewrote this rule.

SECTION .1100. RULEMAKING PROCEDURES

(Repealed)

Editor's Note. — This section was repealed by amendment adopted June 23, 1977, certified July 1, 1977.

SECTION .1200. BOARD HEARINGS

.1201 Nature of Hearings

(a) All general applicants may be required to appear before the board at a hearing to answer inquiry about any matter under these rules.

(b) Each comity applicant shall appear before the board to satisfy the board that he or she has met all the requirements of Rule .0502.

History Note: Statutory Authority G.S. 150A-11; 23; Eff. February 1, 1976.

Editor's Note. — This Section .1200, formerly entitled "Contested Cases," was rewritten by amendment adopted by the Board of Law Examiners June 23, 1977, and certified July 1, 1977. The amendment substituted present Rules

.1201 through .1207 for former Rules .1201 through .1209. The history notes from the former rules in this section have been added to the corresponding rules in the section as amended.

.1202 Notice of Hearing

(a) The chairman will schedule the hearings before the board and such

hearings will be scheduled by the issuance of a notice of hearing mailed to the applicant or his attorney within a reasonable time before the date of the hearing.

History Note: Statutory Authority G.S. 150A-23; Eff. February 1, 1976.

.1203 Who Shall Conduct Hearings

All hearings shall be heard by the board except that the chairman may designate three or more members to serve as a panel to conduct these hearings. A panel will report to the board its findings and if called for, a favorable recommendation. If no recommendation is made by the panel, the chairman will schedule a de novo hearing before the full board.

History Note: Statutory Authority G.S. 150A-24; Eff. February 1, 1976.

Editor's Note. — Former Rule .1203, Examination Review Hearing, was repealed by amendment adopted at a regular quarterly

meeting of the Council of the North Carolina State Bar and approved by the Supreme Court November 4, 1976.

.1204 Continuances; Motions for

Continuances, adjournments and like dispositions will be granted to a party only in compelling circumstances, especially when one such disposition has been previously requested by and granted to that party. Motions for continuance should be made to the secretary of the board and will be granted or denied by the chairman of the board.

History Note: Statutory Authority G.S. 150A-11; Eff. February 1, 1976.

.1205 Subpoenas

(a) The board shall have the power to subpoena and to summon and examine witnesses under oath and to compel their attendance and the production of books, papers and other documents and writings deemed by it to be necessary or material to the hearing as set forth in G.S. 84-24.

(b) The secretary of the board is delegated the power to issue subpoenas in the board's name.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

.1206 Depositions and Discovery

(a) A deposition may be used in evidence when taken in compliance with the N.C. Rules of Civil Procedure, G.S. 1A-1. The board may also allow the use of depositions or written interrogatories for the purpose of discovery or for the use as evidence in the hearing or for both purposes pursuant to the N.C. Rules of Civil Procedure.

(b) A party may submit sworn affidavits as evidence to be considered by the board in a board hearing. The board will take under consideration sworn

APPENDIX IX—RULES GOVERNING ADMISSION TO PRACTICE OF LAW

affidavits presented to the board by persons desiring to protest an applicant's admission to the North Carolina Bar.

History Note: Statutory Authority G.S. 150A-28; Eff. February 1, 1976.

.1207 Reopening of a Case

After a final decision has been reached by the board in any matter, a party may petition the board to reopen or reconsider a case. Petitions will not be granted except when petitioner can show that the reasons for reopening or reconsidering the case are to introduce newly discovered evidence which was not presented at the initial hearing because of some justifiable, excusable or unavoidable circumstances and that fairness and justice require reopening or reconsidering the case. The decision made by the board will be in writing and a copy will be sent to the petitioner or his attorney and made a part of the record of the hearing.

History Note: Statutory Authority G.S. 150A-11; Eff. February 1, 1976.

Appendix IX-A. Rules Governing Practical Training of Law Students

(Approved by the Supreme Court March 14, 1973.)

Article

- II. General Definition.
- III. Eligibility.

ARTICLE II — General Definition:

Subject to additional definitions contained in these rules which are applicable to specific articles or parts thereof, and unless the context otherwise requires, in these rules:

F. *Second Year Law Student* — A student regularly enrolled and in good standing in a law school in this state who has satisfactorily and substantially completed fifty percent (50%) of the requirements for a first professional degree in law (J.D. or its equivalent).

Editor's Note. — The amendment adopted by the Council of the North Carolina State Bar on April 15, 1977, and approved by the Supreme Court May 11, 1977, added subdivision F. The order amending this Article further provides "that these amendments be on a trial basis for

one year commencing July 1, 1977."

As the rest of this Article was not changed by the amendment, only the introductory language and subdivision F are set out.

ARTICLE III — Eligibility:

In order to engage in activities permitted by these rules, the law student must:

B. A student regularly enrolled and in good standing in a law school in this State who has satisfactorily completed at least two thirds of the requirements for a first professional degree in law (J.D. or its equivalent); provided a Second Year Law Student as defined in Article II may engage in the activities specified in Article VI, Section C subject to the limitations set forth in said Article VI, except that the supervising attorney must be present at all trials.

Editor's Note. — The amendment adopted by the Council of the North Carolina State Bar on April 15, 1977, and approved by the Supreme Court May 11, 1977, added the proviso to subdivision B. The order adopting the amendment further provides "that these

amendments be on a trial basis for one year commencing July 1, 1977."

As the rest of this Article was not changed by the amendment, only the introductory language and subdivision B are set out.

STATE OF NORTH CAROLINA

DEPARTMENT OF JUSTICE

Raleigh, North Carolina

September 15, 1978

I, Rufus L. Edmisten, Attorney General of North Carolina, do hereby certify

APPENDIX IX-A—RULES GOVERNING PRACTICAL TRAINING

that the foregoing 1978 Interim Supplement to the General Statutes of North Carolina was prepared and published by The Michie Company under the supervision of the Department of Justice of the State of North Carolina.

RUFUS L. EDMISTEN

Attorney General of North Carolina

GENERAL LAWS OF 1977

Ch.	Sec.	General Statutes	Ch.	Sec.	General Statutes
21	14	1403-377 to 1403-378 repealed			1403-377 Repealed
		1403-378 to 1403-379 repealed			1403-378 Repealed
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204	7.1	1403-379 to 1403-380 repealed			1403-380 Repealed
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711	33	TA-414	711	57	1403-414 Repealed
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711	59	TA-440	711	83	1403-440 Repealed
711	60	TA-441	711	84	1403-441 Repealed
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711	62	TA-443	711	86	1403-443 Repealed
711	63	TA-444	711	87	1403-444 Repealed
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711	65	TA-446	711	89	1403-446 Repealed
711	66	TA-447	711	90	1403-447 Repealed
711	67	TA-448	711	91	1403-448 Repealed
711	68	TA-449	711	92	1403-449 Repealed
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Appendix XI. Comparative Tables

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